United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

509

APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 22,029

DISTRICT OF COLUMBIA,

Appellant,

v.

ELIZABETH W. FRITZ,
Administratrix, c.t.a., of the
Estate of Elizabeth M. Fritz,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

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I N D E X

	Page
Relevant docket entries	1
Complaint	3
Answer	6
Exhibit No. 9	10
Official Transcript of Proceedings:	
Testimony of R. Joseph Dooley	11
Testimony of Elizabeth W. Fritz	17, 60
Testimony of Andrew Bowie	40, 79
Testimony of William F. Farrell	74
Testimony of William H. Hoffman	82
Testimony of William Lawson	84
Testimony of Marion Mann	103
Testimony of Julius Stickell	111
Instructions to the jury	124
Verdict	142

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2581-65

ELIZABETH W. FRITZ,
Administratrix, c.t.a. of the
Estate of Elizabeth M. Fritz,

v.

DISTRICT OF COLUMBIA,
a Municipal Corporation

CIVIL DOCKET

DATE		RELEVANT ENTRIES
1965		
Oct.	18	Complaint, appearance, jury demand
Nov	8	Answer of deft to complaint
1966		
Aug	1	Interrogatories of pltff to deft
1967		
Mar.	9	Answer of deft to interrogatories of pltf
Oct	30	Pretrial Proceedings
1968		
Jan	26	Deposition of plaintiff for defendant.

Mar	8	Application for leave to file Notice to take deposition of Dr. Bernard Walsh argued and denied, name stricken from witness list and not to be used at all. Gesell, J.
Mar.	12	Order striking name of Dr. Bernard Walsh from list of witnesses and Dr. Walsh not to be called to testify at trial. (N) Gessell, J.
Mar.	26	Jury and two alternates sworn; trial begun; respited to Mar. 27, 1968. McManus, J.
Mar.	27	Trial resumed; same jury and alternates; respited to Mar. 28, 1968. McManus, J.
Mar.	28	Trial resumed; same jury and alternates; respited to Mar. 29, 1968. McManus, J.
Mar.	29	Trial resumed; same jury and alternates; alternate jurors discharged; verdict for the plaintiff in the sum of $5,000.00 under the Survival Statute and in the sum of $15,000.00 under the Wrongful Death Statute against the defendant. McManus, J.
Mar.	29	Instructions of pltf. and deft.
Mar.	29	Verdict of jury
Mar.	29	Verdict and judgment for the plaintiff in the sum of $5,000.00 under the Survival Statute and in the sum of $15,000.00 under the Wrongful Death Statute against the defendant. (N) McManus, J.
Apr	8	Motion of defendant for judgment N.O.V. or for new trial
Apr.	10	Motion of deft. for judgment N.O.V. or in the alternative for a new trial, Denied. (fiat) (N) McManus, J.
Apr.	10	Order denying deft's. motion for judgment N.O.V. and denying the alternative motion for a new trial. (N) McManus, J.

May 9 Notice of appeal of deft.

May 14 Transcripts (4 Vols.)

May 17 Transcripts (4 Vols.) of proceedings, 3-26-68, Vol. I; 3-27-68, Vol. II; 3-28-68, Vol. III; 3-29-68, Vol. IV.

* * * * *

[Filed October 18, 1965]

COMPLAINT
(For Wrongful Death and Damages under Survival Act)

FIRST CAUSE OF ACTION

1. The claims for relief herein on behalf of the plaintiff, ELIZABETH W. FRITZ, Administratrix, c.t.a., of the Estate of ELIZABETH M. FRITZ, duly appointed and qualified as such by the United States District Court for the District of Columbia, against the defendant, DISTRICT OF COLUMBIA, a Municipal corporation, are each within the jurisdiction of this Court under the Wrongful Death Act, Title 16-1201 to 16-1203; and Survival Act, Title 12-101 and Title 20-501 of the District of Columbia Code (1961 edition).

2. Defendant is a municipal corporation charged by law with the planting and removal of trees, and the care and maintenance of the streets, sidewalks and tree belts located in the District of Columbia, as will more fully appear hereafter.

3. Plaintiff alleges that, prior to October 24, 1964, defendant removed a tree near the curb, at or near the entrance to the Church of the Annunciation, on the south side of 3810 Massachusetts Avenue, N.W., Washington, D. C., without replacing it, and negligently caused and permitted a hole, hollow or depression to exist and remain unfilled where it had removed said tree; and through its agents, servants and employees negligently caused and permitted a dangerous condition to exist for a long time; negligently failed to erect a barricade or lights, and negligently omitted to fill or cover said hole or hollow and failed to have adequate lighting thereat, knowing full well that pedestrians may step therein off the curb to enter the street or church at this point.

4. On or about October 24, 1964, decedent alighted from an automobile with plaintiff on the south side of Massachusetts Avenue close to the curb at or near the entrance to 3810 Massachusetts Avenue, N. W., and started to walk to the church entrance when she fell in the hole or hollow, lightly covered with leaves, where said tree had been removed, and said hole or hollow had not been filled or covered, and remained unlighted and without a barricade, due to the negligence and carelessness of the defendant. By reason whereof, plaintiff's decedent sustained mortal injuries which resulted in her death on November 3, 1964.

5. Timely notice as required by Title 12, Section 208 of the District of Columbia Code (1961), was tendered to defendant.

6. As a result of the aforesaid wrongful death of plaintiff's decedent, pecuniary loss, including medical, hospital, and funeral expenses, and other substantial damages have been sustained by the plaintiff, who is the daughter and next of kin of said decedent, in the sum of SEVENTY-FIVE THOUSAND ($75,000.00) DOLLARS.

7. Plaintiff alleges that the wrongful and negligent acts of said defendant in causing the death of said decedent were such that, if death had not occurred, said decedent would have been entitled to maintain actions to recover damages against said defendant during her lifetime, but that no actions to recover damages were brought during her lifetime.

WHEREFORE, Plaintiff, ELIZABETH W. FRITZ, Administratrix, c.t.a. of the Estate of ELIZABETH M. FRITZ, and on her own behalf as heir and next-of-kin of decedent, pursuant to Section 16-1201 et seq., demands judgment against the defendant, DISTRICT OF COLUMBIA, a corporation, in the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00) besides costs.

SECOND CAUSE OF ACTION

1. Paragraphs 1, 2, 3, 4, 5 of the Complaint are incorporated herein by reference.

2. As a result of the aforesaid, due to the negligence and carelessness of the defendant, plaintiff's decedent sustained mortal injuries, substantial medical and hospital expenses, and loss of future earnings during her life expectancy, all to the damage of plaintiff's decedent in the sum of FIFTY THOUSAND ($50,000.00) DOLLARS.

WHEREFORE, pursuant to Title 12-101 and Title 20-501 of the District of Columbia Code, plaintiff ELIZABETH W. FRITZ, Administratrix, c.t.a. of the Estate of ELIZABETH M. FRITZ, deceased, demands judgment against the defendant, DISTRICT OF COLUMBIA, a corporation, in the sum of FIFTY THOUSAND DOLLARS ($50,000.00) besides costs.

* * * * *

[Filed November 8, 1965]

ANSWER

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

First Cause of Action

1. The District of Columbia admits the existence of the statutes alleged in paragraph numbered 1 of the first cause of action,

denies that this Court has jurisdiction solely by reason thereof and is without knowledge or information sufficient to form a belief as to the remaining allegations contained therein.

2. The District of Columbia avers that the allegation contained in paragraph numbered 2 of the first cause of action are conclusions of law, answer to which is not required by the defendant. If answer be required, however, said conclusions, as alleged, are denied.

3. The defendant admits that prior to October 24, 1964, its employees removed a tree near the entrance of the Church of the Annunciation on the south side of 3810 Massachusetts Avenue, N. W., Washington, D. C., as alleged in paragraph numbered 3 of the first cause of action, and denies the remaining allegations contained therein.

4. The defendant is without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph numbered 4 of the first cause of action and denies the remaining allegations contained in said paragraph.

5. The District of Columbia avers that the allegations contained in paragraph numbered 5 of the first cause of action are conclusions of law, answer to which is not required by the defendant. If answer be required, however, said allegations are denied.

6. The defendant denies all allegations of wrongful death attributable to it in paragraph numbered 6 of the first cause of action and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

7. The District of Columbia avers that the allegations contained in paragraph numbered 7 of the first cause of action are conclusions of law, answer to which is not required by the defendant. If answer be required, however, said allegations are denied.

Second Cause of Action

1. For answer to paragraph numbered 1 of the second cause of action, the District of Columbia incorporates by reference and makes a part hereof its answers to paragraphs numbered 1 through 5 of the first cause of action.

2. The District of Columbia denies the allegations contained in paragraph numbered 2 of the second cause of action.

Further answering the complaint, the District of Columbia denies all allegations not specifically admitted or otherwise answered.

Third Defense

If the plaintiff, Elizabeth W. Fritz or the decedent, Elizabeth M. Fritz, were injured or damaged as alleged, said injuries or damages were caused by their sole or contributory negligence.

Fourth Defense

The District of Columbia avers that decedent's death was due to natural causes or to causes not attributable to defendant and, therefore, the complaint should be dismissed.

* * * * *

Exhibit numbered 9

TABLE II

Table showing the present worth at 3½ percent of an annuity for a term certain, of an income interest for a term certain, and of a remainder interest postponed for a term certain

1 Number of years	2 Annuity	3 Term certain	4 Remainder	1 Number of years	2 Annuity	3 Term certain	4 Remainder
1	0.9662	.033816	.966184	16	12.0941	.423294	.576706
2	1.8997	.066489	.933511	17	12.6513	.442796	.557204
3	2.8016	.098057	.901943	18	13.1897	.461639	.538361
4	3.6731	.128558	.871442	19	13.7098	.479844	.520156
5	4.5151	.158027	.841973	20	14.2124	.497434	.502566
6	5.3286	.186499	.813501	21	14.6980	.514429	.485571
7	6.1145	.214009	.785991	22	15.1671	.530849	.469151
8	6.8740	.240588	.759412	23	15.6204	.546714	.453286
9	7.6077	.266269	.733731	24	16.0584	.562043	.437957
10	8.3166	.291081	.708919	25	16.4815	.576853	.423147
11	9.0016	.315054	.684946	26	16.8904	.591162	.408838
12	9.6633	.338217	.661783	27	17.2854	.604988	.395012
13	10.3027	.360596	.639404	28	17.6670	.618346	.381654
14	10.9205	.382218	.617782	29	18.0358	.631252	.368748
15	11.5174	.403109	.596891	30	18.3920	.643722	.356278

§ 20.2031–8 VALUATION OF CERTAIN LIFE INSURANCE AND ANNUITY CONTRACTS.—(a) The value of a contract for the payment of an annuity, or an insurance policy on the life of a person other than the decedent, issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts. An annuity payable under a combination annuity contract and life insurance policy on the decedent's life (e. g., a "retirement income" policy with death benefit) under which there was no insurance element at the time of the decedent's death (see paragraph (d) of § 20.2039–1) is treated like a contract for the payment of an annuity for purposes of this section.

(b) As valuation of an insurance policy through sale of comparable contracts is not readily ascertainable when, at the date of the decedent's death, the contract has been in force for some time and further premium payments are to be made, the value may be approximated by adding to the interpolated terminal reserve at the date of the decedent's death the proportionate part of the gross premium last paid before the date of the decedent's death which covers the period extending beyond that date. If, however, because of the unusual nature of the contract such an approximation is not reasonably close to the full value of the contract, this method may not be used.

(c) The application of this section may be illustrated by the following examples. In each case involving an insurance contract, it is assumed that there are no accrued dividends or outstanding indebtedness on the contract.

Example (1). X purchased from a life insurance company a joint and survivor annuity contract under the terms of which X was to receive payments of $1,200 annually for his life and, upon X's

* * * * *

OFFICIAL TRANSCRIPT OF PROCEEDINGS

* * * * *

[5] R. JOSEPH DOOLEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Father, will you tell the Court and jury your name?

A. Reverend R. Joseph Dooley.

* * * * *

Q. Directing your attention to October 24, 1964, where were you stationed at that time?

* * * * *

A. I was stationed at the Church of the Annunciation.

Q. Would you tell us where the Church of the Annunciation is located?

[6] A. It is at 3810 Massachusetts Avenue, Northwest.

* * * * *

Q. Now, directing your attention to Massachusetts Avenue and adjacent areas toward the front of the church - First of all, do you know where it was that Mrs. Fritz suffered her injury?

[7] A. Yes, I do.

Q. Describe for us then the layout of the sidewalk.

A. In front of the church leading into the building we have a rather wide sidewalk going into the church and this happened several feet from that sidewalk. I guess you would say to the south of it, if it can be included - Then also the - This is between the area of the sidewalk that runs along Massachusetts Avenue and the curb.

Q. Were there any no parking signs in that area?

A. We have on occasion of course, when there is a funeral or something of that nature, the signs are put up for that occasion, but also during rush hour there are "No Parking" signs on Massachusetts Avenue.

Q. Do you recall whether in 1964 there were fixed or permanent signs on each side of the wide sidewalk leading to the church?

A. There were, yes.

Q. Then immediately back of the first sign you come to, if you were driving north, or such direction as the church were on your right, what was the condition of the area at that point?

A. At that particular day, the area was, being in the fall of the year, was leaf covered completely.

Q. Was there an area between the curb and the sidewalk that ran parallel to Massachusetts Avenue?

A. Yes.

Q. About how wide is this strip between the curb and Massachu-

[8] setts Avenue's sidewalk on the right?

A. Oh, I would say six, eight feet.

Q. Now, did you see the place where Mrs. Fritz was injured?

A. Yes, I did.

* * * * *

Q. All right, when did you see it?

A. After the accident.

Q. Was it immediately after or some time after?

A. Within a few minutes after. She was still on the scene.

Q. Mrs. Fritz was still on the scene?

A. Right. She had been helped to her car.

Q. Who was helping her into the car?

A. You see, I was in the church at the time and Father Farrell, who was on the scene very shortly after it happened, within minutes, helped to put Mrs. Fritz back into her own private automobile with the assistance of the others who were on the scene, and then came into the church to summon myself.

Q. When you got there describe what you saw as to the injured.

A. Well, I examined the situation of course, spoke to Miss Fritz and also to her mother who was in the car in a great deal of pain at the time, and the area that she had the fall, as I said a mo-

[9] ment ago, was leaf covered. The indentation was evident because I think of the impact of her fall and as I would say it was several inches deep and maybe a foot and a half, two feet in diameter.

Q. In diameter?

A. Right.

Q. And what was the condition of the leaves there?

A. The whole area was, you know, leaf covered and damp. They were packed together, so forth.

Q. Where was the indentation that you observed?

A. It was between the sidewalk running parallel to Massachusetts Avenue and the curb.

Q. What was the condition of lights or lighting at that point?

A. It has been changed since, but at that time the lighting was just the lamp post, lamp post lighting. Now they have the florescent type.

* * * * *

Q. Describe it.

A. There was a lamp post across the street from the location and then, of course, on our side it was further down the block, actually on the church side.

Q. What was the state of illumination at this point in the parking

[10] area as you have described?

A. I would say very poor.

* * * * *

Q. Father Dooley, I ask you about what was the depth of the area you described.

MR. HOROWITZ: I think he already said several inches.

MR. MILLER: I am asking if he can tell the jury what he means in his best judgment by several.

A. I would say perhaps six to eight.

By Mr. Miller:

Q. I think you have already described the diameter as one and a half, two feet.

A. Right.

* * * * *

[11] CROSS EXAMINATION

By Mr. Horowitz:

Q. Reverend Dooley, we are not too interested in what the hole looked like after the accident but what the hole looked like before the accident. Do you remember a tree being planted at that spot sometime prior to the accident?

A. Yes, I do.

Q. Approximately how long prior to the accident was the tree planted at that spot?

A. I would say it was within the year. I would say six to eight months.

Q. Do you remember the tree having been removed from that spot?

A. Yes, it was.

Q. Do you remember when it was removed?

A. It was either the latter part of that summer or early fall.

Q. Did you have occasion to look at the spot from where the tree had been removed between the time it had been removed and the time that Mrs. Fritz fell?

A. No.

Q. You had not. So you did not know what condition that hole was in prior to her fall; is that right?

A. That is correct.

* * * * *

[14] ELIZABETH W. FRITZ

plaintiff, called as a witness by and on her own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Will you tell the Court and jury your name?

A. Elizabeth Wright Fritz.

Q. Miss Fritz, you are the daughter of the deceased Elizabeth Fritz, are you?

[15] A. Yes.

Q. I think you have been appointed by the probate court as the administratrix of your mother's estate.

A. Yes.

Q. In that capacity you have filed this action, have you?

A. Yes.

Q. Were you the only child, the only living child of your mother?

A. Yes.

Q. Your parents.

A. Yes. The only child they had.

Q. Will you tell the jury when your mother was born.

A. I believe it was April 27, 1886.

Q. When were you born?

A. May 22nd, 1912.

Q. Directing your attention now to 1963, 1964, would you describe first your mother's appearance in height and so forth?

A. She is approximately five feet three and she weighed approximately 160 pounds. She was active, very active in the house. She did many things around the house. I taught school, as has already been mentioned.

* * * * *

[16] Q. After you completed your training and began teaching, where did you live?

A. I lived with my parents all my life.

Q. When did your parents move into the house that your mother owned at the time of her death?

A. Approximately twenty years ago.

Q. What is the address of that house?

A. 4412 Lowell Street, Northwest.

Q. How large a home or house is that?

A. Comparatively small. We only have a living room, dining room, kitchen on the first floor, with a downstairs lavatory, coat

closet. Upstairs one nice sized bedroom and two smaller bedrooms and a bath.

Q. Did you live in that home with your parents up to the time of your father's death?

A. Yes, we lived there.

Q. When did your father die?

A. August 23, 1960.

Q. After 1960, then, would you describe where you lived?

[17] A. We lived in - still in the same home. My mother wished to remain there. She liked it very much. It is small, comfortable and we remained there.

Q. Did your mother inherit that property from your father by virtue of being --

A. Yes, she did.

Q. Would you tell the jury on the day of your mother's injury what was the date of that?

A. October 24, 1964. It was a Saturday.

* * * * *

Q. What time approximately did you and your mother leave her home?

A. Around about I would say twenty minutes after seven, approximately, and we left to go to church. Confession started at seven-thirty.

* * * * *

[18] Q. Where were the street lights located near this no parking sign where you say you stopped?

A. There were no street lights nearby. One some distance back. I would say approximately twenty-five to fifty feet in the rear of this car and then the other one was across the street, up some distance. The old type of light that had the - What you call the - I don't know whether it is white type of shell. It is not the florescent type.

Q. What was the --

MR. HOROWITZ: Your Honor, I object to anything having to do with lights. I am going to leave this as a continuing objection.

MR. MILLER: It is an issue in the pre-trial.

THE COURT: Overruled. You may proceed.

[19] * * * * *

Q. Miss Fritz, have you placed on the blackboard a pictorial representation of the area in question?

A. Yes, to the best of my knowledge.

Q. Would you be good enough to come to the blackboard and show the jury the various objects you have described and then show where your car stopped and was parked.

* * * * *

A. This is Massachusetts Avenue, this is going east. We came from this direction, we turned from 39th Street and headed over to here and parked right behind that sign.

Q. Where is that sign located?

A. Right at the edge of the sidewalk, on each side. There is a "no parking" sign.

Q. What did the sign say?

A. "No Parking at any time." Entrance to the church.

[20] Q. Tell them what is located there.

A. The former tree was here. (Indicating.) Other trees conveniently spaced twenty-five to fifty feet on either side of the entrance to the church. You have approximately six to eight feet of grass from the curb to the sidewalk. Then we have the sidewalk that runs parallel just as Massachusetts Avenue does and this is the entrance. There is also a grassy entrance on each side of the church. This is the church entrance. You could go in this way to the main entrance to the church. (Indicating.)

Q. Mark on there the directions or approximate directions. Over at the edge of the blackboard.

A. This is east and this is west. This is south and this is north. (Indicating.)

Q. Could you draw on the blackboard the area where your car was parked by you that night?

A. (Indicating.) Right behind the sign. That is the sign and we were right behind it.

Q. Where is the sign?

A. Right here at the end of the concrete, on both sides. There is a sign on this side and a small sign on this side. One on each side of the entrance to the church. (Indicating.)

Q. You have drawn out here, Miss Fritz, two areas which are marked sidewalk which appear to be parallel with Massachusetts Avenue.

[21] A. Yes.

Q. On the night in question with what were they paved?

A. They are paved with concrete and this is paved with concrete.

Q. Now, with reference to the proportion of what is shown there, could you tell us about how far the hole in question was between the curb and the sidewalk and where it was with reference to any portion of your vehicle. Tell us first and then we will have it drawn in.

A. It was approximately two to three feet from my car and I would assume five feet from the sidewalk. In other words, it was - Where the former tree had been, that hole was in this area and covered with leaves. We didn't know it was there.

Q. Before we get to that was it opposite any particular door or portion of your vehicle?

A. Yes, it was opposite the front door if I remember correctly.

Q. Which seat was your mother riding in?

A. She was sitting in the front seat, right next to me.

* * * * *

Q. You have also drawn a circle somewhat to the south of the

[22] front portion or central portion of the car; is that right?

A. Yes.

Q. What is that circle you have drawn in green?

A. That is where the former tree was.

Q. Just put a cross in that circle so we will know that is the location of the former tree or hole.

(Witness complied.)

Q. You may resume the stand now, Miss Fritz. I think in describing what occurred on October 24, 1964, you told us how you drove to the area in question and stopped your car immediately back of the "No Parking" sign.

A. Yes, I did.

Q. Now, tell the jury what occurred from that time on.

A. There was a great deal of heavy traffic. My mother didn't want me to slide off the left side of the car. She said, "Follow me." So she went out the right side of the door, right door, opened it, and I slid across the street [sic]. She walked two or three steps and fell. I got out as quickly as I could and tried to catch her and wasn't able to.

Q. Where was it that she fell?

A. Right in the hole that is marked on that map. The best - The map I tried to draw.

* * * * *

[23] Q. What did you observe with reference to the cause of your mother's fall?

MR. HOROWITZ: I object to that, too.

THE COURT: Well, overruled. What did you observe? You may answer.

A. I only observed leaves and my mother did, too, when she got out. If I had known there was a hole there I would certainly have not parked. The area was covered with leaves and as she went into it, down she went.

Q. Now, as she went into it, what did she go into?

A. A hole. She would have to go into a hole.

Q. Describe the hole that she went into.

* * * * *

A. It was approximately six to eight inches deep and approximately one and a half to two feet wide.

By Mr. Miller:

Q. What do you mean by wide?

A. Well, across.

Q. Diameter?

A. Yes.

Q. If you have a circle, the diameter is that portion that would be the equator?

A. That is right.

[24] Q. Is that what you mean?

A. Right across, that would be it.

Q. And describe further what if anything you observed about the hole that you haven't already told us.

A. There is nothing else that I know of about the hole except I was surprised.

Q. Why were you surprised?

A. Because if I had known that hole was there I know my mother and I wouldn't have parked there.

Q. Now, were there any - Describe the area with reference to leaves, if any.

A. Well, I haven't - No certain trees. There were oak trees on Massachusetts Avenue and they are quite thick and heavy when they come down and they mat together and the area was covered with leaves and being in October --

Q. What happened when your mother, I think you said, went down into the hole. Just tell what you observed thereafter.

A. I tried to get to her.

Q. What did you observe, not what you did, at the moment. She had her foot wherever you described it. Tell what motion if any she described.

A. She went down - Maybe I don't quite understand the question.

Q. Well, did she go to the ground?

A. She went to the ground. She went down hard.

Q. And in what position did she fall? Forward? Backward?

[25] A. Went down backward.

Q. Did you then observe her, hear anything said?

A. I tried to get there, keep her from falling, as I said before. I couldn't make it. And when I got there I just said - Just kept her there for a minute, having taken Red Cross courses they say let somebody lie a few minutes before you move them. So I knew --

Q. What was her condition as you then observed it?

A. She was in pain.

Q. How could you tell?

A. Her face. She didn't say anything. She kept quiet as could be. It was such a shock, as anything is like that, to anyone, and she just didn't say a word.

Q. What did you observe about her face or appearance?

A. I would say kind of an odd - Well, you can't see too much at night when the light isn't good, but I knew that she was there and she didn't look well and I knew I had to do something about it.

* * * * *

[26] Q. Without reference to the location of the lights, what was the degree of illumination at the point where the hole was?

A. Very poor.

* * * * *

Q. What then did you do or what occurred after you rushed to your mother's assistance?

A. Well, Father Farrell - One of the assistants of the Parish happened to come, came out of nowhere, and two people that I didn't know who were going also in church at the time came over. They helped me assist my mother into the car.

Q. How did you assist your mother?

A. We helped her up slowly and then she walked carefully, didn't say anything, and went - And we sat her down very easily in the car.

Q. Where did you sit her in the car?

A. In the front seat where she had been sitting when we rode to the church.

Q. Where then did you go in the car?

A. Well, we went - I knew the only thing to do was to go home and find out what my physician would suggest to do next.

Q. Did you do that?

[27] A. We did.

Q. Who drove the car?

A. I drove the car.

Q. You drove back to your home?

A. Yes.

Q. What did you do when you got to your home?

A. Well, two of the people that were there asked me if I had anyone at home to help me and I said no one, and they said, "If you will tell us where you live we will go and help you just get your mother in the home." So they followed me. We arrived at our home in, I guess, twenty minutes or so and I pushed the lever to push the front seat back so she would have more room and we slid her around, turned her around easily and stood her up hoping she would be able to go in the house and she said, "I am sorry, I can't move. It hurts so bad." So we didn't - She didn't budge. We turned her around, sat her down on the car and then I said, "I will go in and call the doctor."

Q. Did you then call the doctor?

A. Yes, I did.

Q. What doctor did you call?

A. Dr. Andrew Bowie, our regular physician, and has been for many years.

* * * * *

[28] Q. Was your mother then taken into the hospital?

A. Yes, we had to have two orderlies come out and lift her out of the car and put her in the wheelchair and took her in.

* * * * *

Q. What was done for your mother at the hospital that night?

A. The technician, the x-ray technician, took several x-rays. They decided to give her a shot to calm her and so she could be able to sleep. They put her on a rolling sort of bed and we went up to the third floor, one of the orderlies accidentally forgot to - That she had been in shock and he rolled her down backward and that caused her to, as I say, unswallow, and we had to take care of her. Dr. Bowie said he would order traction and I stayed with her until about eleven o'clock.

* * * * *

[30] Q. Did your doctor tell you that night what the injuries consisted of?

A. He told me that it was a broken hip.

* * * * *

[33] Q. Did you ever give your consent, Miss Fritz, to have a post-mortem autopsy performed on your mother?

A. No, I did not.

Q. Were you ever asked to do so by the District of Columbia?

A. No, I wasn't asked to give - Even write a statement.

* * * * *

Q. Miss Fritz, may we go back now to, say, the last couple of years before your mother's death. Would you describe her appearance and activity and what her life consisted of, please?

[34] A. Well, she belonged to a little group that met once a month and they had been members of this club for about thirty years. They had been in P.T.A. work together and had a glorious time, once a month together. She often, many times in fact, she took care of the beds and she did the dishes. I went to school, and she took care of her own lunch. She helped with the housework. She went out in her yard and loved the flowers, did little things around the yard. Went visiting, and we went many places together. In fact, we went on trips together. In fact, the previous spring we had gone to Williamsburg and it was her idea.

Q. Did there come a time when she had a mild coronary of some kind?

A. Yes.

Q. When was that?

A. In May, 1964.

Q. Just tell us what happened.

A. Well, it happened while I was at school. She wanted to turn a mattress and she did and I didn't get notified - I wasn't told about it until I came home. She said, "It got away from me but I got it turned over." Two nights later I was correcting some work at school - From school and she had this peculiar little pain across her

shoulders and the best way it was relieved at the time was I would rub it for her and she said that made it feel better and she sat up most of the night so I sat up until 3:00 correcting tests and keeping her
[35] company. Then, of course, before that when the pain first appeared, I called Dr. Bowie and he prescribed something that would relieve it, and I called him again at six-thirty and he said he would prescribe something else and to call him in an hour's time which I did. He said, "Knowing your mother's case we are going to take her in the ambulance, and I will send an ambulance," which he did, and he said, "Tell her, I know she will go." So she said, "I will get dressed." I said, "No. He wants you to go like you are." So the ambulance arrived and the men kidded her and she kidded right back with them. They said they hadn't dropped anybody yet so to hold onto the railings as they went down the steps. She had a glorious time. She was sorry that they didn't blow the siren on the way to the hospital. Dr. Bowie met her at the emergency entrance because he knew I was by myself and escorted her to her room. She kidded with him the entire time. In fact, everybody that went over there to see her during the month that she was there knew that she was in very good spirits. She had a good keen sense of humor and she joked quite every day [sic].

Q. How long was your mother in the hospital on that occasion?

A. She went in on the twentieth of May, 1964, and the doctor waited until school was over so I would be home with her which was approximately thirty days later, I assume.

Q. Now, during the time that she was in the hospital in May of 1964, did you notice any pain or distress on your mother's part?

[36] A. Not at all.

* * * * *

Q. Did you notice any difference between her condition then when she was hospitalized in the spring in May, than from the time that she was hospitalized with her injury -- October?

A. October.

Q. -- in October?

A. There was an entire difference.

Q. What was the difference?

A. She had no desire to do anything.

Q. When?

A. In October of 1964, after the fall. I think the shock upset her and she didn't have any zip at all.

Q. Was that any different from the --

A. May of 1964? She was very jovial and kidded and laughed every day and came home feeling very fine.

Q. When she came home your school, I guess, was out in June of 1964. Describe to the jury what your mother's condition was and activities were from June up until the date of her injury.

A. She picked up and went right on and did the same things she had done before. Household jobs, washing dishes, helping make the beds, going up and down stairs. Didn't seem to be any diffi-
[37] culty at all and enjoyed taking trips. We went for a little trip or two and we only came back to the city once or twice to see Dr. Bowie and she was in fine condition.

Q. Did you go anywhere on vacation that summer of 1964?

A. We went to Chesapeake Bay and stayed most of the summer on the Bay.

Q. What did your mother do while she was down on the Bay?

A. The same type of things. We went mainly to enjoy ourselves with our neighbors next door and we had this cottage we used and we had suppers outside. She would prepare the meals. I would help. We would make beds together. We would go on rides together. We would walk back and forth. We played cards. We did all the enjoyable things. She always crocheted. She was quite a crocheter.

Q. Did your mother appear to have any physical difficulties or difficulty of any kind during the summer of 1964?

A. None, didn't appear to be, from what the doctor said.

Q. She was cured from what you observed?

A. Yes, from what I observed. She appeared to be fine.

Q. By the way, did your mother use a cane?

A. Occasionally.

Q. Describe the circumstances.

A. Occasionally, yes. She would do it when she would go out sometime [sic] in the evening. Not at home. Once in a while at the Bay she would take it, yes, but she never used it at home.

Q. Did she have a cane with her the evening she was injured?

[38] A. Yes, she did.

Q. For what reason?

A. I don't know. I guess she just took it along as a --

* * * * *

A. (Continuing.) She took it along, like anybody else would take a cane along.

* * * * *

Q. Now, tell the jury why you parked your automobile in the manner that you did on the night of your mother's injury.

A. Well, we had always parked in that area, either on one side of the entrance or the other. She never wanted to be taken up to the entrance and let out like an invalid. She always wanted me to park in the area of the grassy part between the curb and the sidewalk and always go in together.

Q. Had you mother for a number of years had a condition of diabetes?

A. Yes, since October, 1950.

Q. 1950?

A. Yes.

Q. Was that under control?

A. Yes, it was under control.

Q. Tell us how.

A. All I can say is I am glad I had the doctor I did. She had

[39] insulin and I would inject the insulin each morning into the leg and it was completely under control. She kept a diet and watched her p's and q's.

Q. Had she ever had any problem while she was given medication and under control?

A. It was under control and nothing else.

Q. Now, Miss Fritz, in this type of case, I must ask you if you will tell the jury what financial considerations if any, your mother made to you or in your behalf for the, oh, say two or three, four years preceding her death? What was the financial picture on that?

A. She received an annuity from my father having worked in the United States Naval Gun factory for 49-1/3 years. He had it so arranged that she would receive half of his annuity.

Q. How much did she get then?

A. Approximately two hundred dollars, maybe two hundred and seven dollars a month.

Q. To be precise, was it two hundred and seven dollars and fifty cents?

A. Yes.

Q. Now, what financial contribution, if any, did she make to you or on your behalf?

A. She took care of the entire house.

Q. Break it down. What did the payment consist of?

A. Approximately - Let's see, a hundred dollars for the house.

Q. What was the hundred dollars for?

[40] A. The house.

Q. Well, was that the mortgage?

A. The mortgage, yes. She took care of it because it was hers. She wanted to keep it that way.

Q. What else?

A. The utilities ran approximately twenty dollars a month.

Q. Tell us what those utilities consisted of.

A. Yes. Electricity, telephone and gas. Then we heated our home by oil and she took care of that also which was twenty dollars a month, and with the rest she often took me on trips and bought things for herself and paid her doctor bills and --

Q. Now, on the trips, could you approximate how much it would average per month on your behalf?

A. I would say around a hundred and fifty dollars.

Q. Per month or per - Per month?

A. Now, maybe I misunderstood the question.

Q. I will rephrase it. You said she took you on trips from time to time.

A. Yes.

Q. I am asking the amount of money she spent on you as distinguished from herself on these trips.

A. You want this on a monthly basis?

Q. If you could since the other figures are monthly.

A. Oh, I would say around about - Well, really, this is a little
[41] difficult because sometimes we went on a trip in the spring and then we may not go until another time and to bring it down to dollars and cents, I guess it would run around fifteen dollars a month, maybe. That is the best I can do.

Q. Now, did your mother furnish you the use of the house and so forth, as you have described, at her expense and the items as you have described?

A. Yes. It was her home and I lived with her and she wanted me to live with her. She wanted to take complete care of it.

Q. Have you ever been married, Miss Fritz?

A. No, I haven't.

Q. Was there any other way in which your mother - I know this is difficult, but is there any other way in which your mother contributed financially or in a pecuniary way to you or for your benefit besides what you have described?

A. Occasionally she would surprise me with a present now and then and I assume between the trips and the things we - That she took care of at home, I think this would cover everything.

* * * * *

MR. MILLER: I would like to ask leave to interrupt the testimony of Miss Fritz for the purpose of putting a doctor on who is

[42] here, who has surgery in the hospital in the morning. * * *

* * * * *

ANDREW BOWIE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Tell the Court and jury your name.

A. Andrew K. Bowie.

Q. Where do you reside?

A. 301 Constitution Avenue, Northeast.

Q. What is your profession?

A. I am a physician.

* * * * *

[43] Q. In the course of your practice of medicine did you treat as a patient Mrs. Elizabeth M. Fritz?

A. I did.

Q. When did you first start treating Mrs. Fritz?

A. At least twenty years ago. I think it was 1944.

Q. Describe to the jury her physical condition, let us say, the last several years of her life, her death having occurred November 3, 1964.

A. Her general condition for a person her age was average.

Q. Had you ever treated her for a diabetic condition?

A. I did.

Q. Do you remember when that started, doctor?

A. Years. Ten, fifteen years, I guess, at least.

Q. I believe her daughter's testimony was this occurred in 1950. Is that consistent with your memory?

A. I would say so, be about right.

Q. What was the condition that you treated?

A. Then? At that time?

Q. Yes.

A. Diabetes.

[44] Q. How did you treat it?

A. I treated with the usual treatment, diet, insulin.

Q. Was her condition controlled?

A. Stable.

Q. What medication or treatment did you use to keep it controlled?

A. Insulin.

Q. How often were the injections?

A. Daily.

Q. That was done by her daughter, I believe?

A. Yes.

Q. After having been instructed by you.

A. I think so.

Q. What else, doctor, did you observe about Mrs. Fritz' physical condition?

A. How long back do you want to go now?

Q. I would ask you two or three years before her death, if there is anything significant farther back I want you --

A. Wasn't anything significant during the early years. It was just the usual routine things. Cold, grippe, her diabetic condition had to be kept under control. Very regularly she was checked for that. Then in the early part of 1964 she did have a coronary heart attack. She was in the hospital for approximately a month.

Q. Was that May and early June of 1964?

A. It was May, I am sure it was May, 1964.

[45] Q. What was her condition and what treatment did you give, doctor?

A. When she had the coronary?

Q. Yes.

A. The regular routine treatment for coronary. Bed rest is the most important thing. Digitalis and peritrate, seditives and that about covers it.

Q. How did she respond to the treatment?

A. She responded very well.

Q. After she got out of the hospital and went home, what was then her condition? This was in 1964.

A. Post-coronarily, it was very good. As a matter of fact, she had very little complaint and I think our regular routine seemed to be about the same as far as her diabetic condition, it stayed about the same. I would say it was about the same.

Q. Did you have occasion, ten days or so before her death, to give her an examination?

A. Yes.

Q. When did you see her?

A. I can't tell you the exact date. I know I have checked her at least approximately a couple times a month following the coronary in the spring. The actual date, the fall, I don't have the exact date. It was within at the most, a couple of weeks.

Q. What did your examination then, a couple of weeks approximately prior to her injury, consist of and what were your findings?

[46] A. Well, the checkup consisted of course, the regular blood pressure, heart examination, urine, for sugar, and prescribing the medication that she was on continued with.

Q. And how did she appear to you medically at that time?

A. Quite satisfactory.

Q. Were you then called by Miss Fritz, her daughter, when she was injured?

A. I was.

Q. Tell us when you first saw Mrs. Fritz then after the injury. That is, after the injury that you diagnosed.

A. When I first saw her I saw her, I would say, approximately an hour after I was called which was, I think seven-thirty, eight o'clock that night. The day of --

Q. I can refresh you memory. I think there is no dispute this occurred on October 24, 1964.

A. October 24 is correct. I met her, as a matter of fact, at the hospital.

Q. What did you observe when you met her at the hospital?

A. Well, her complaint, of course, was her hip and we immediately had our deep x-ray and discovered that she did have a fracture.

Q. What area did the fracture occur in?

A. What area?

Q. Of the hip. What part of the hip? What bone?

A. Well, the femur. The head of the femur.

[47] Q. Could you tell us a little bit more about what kind of a fracture it was?

A. It was a complete fracture, if that is what you mean, a complete fracture and since I - Do you want me to go on?

Q. Go right ahead.

A. When I realized it was a fractured hip, and since I don't do any bone surgery, I got in touch with the bone man who took over as far as her hip was concerned and that was the night of the twenty-fourth. On the morning of the twenty-sixth he operated and pinned her hip.

Q. What do you mean, pinned her hip?

A. Well, it is a metal plate they put in with screws that holds the bone in place.

Q. How large is the plate?

A. I believe this Smith-Peterson is about six inches long, the plate was, but the screws in it to hold the bone in proper alignment.

Q. Where was the plate located?

A. In the shaft of the femur and up at the head of the femur which held the two bones together.

* * * * *

[48] Q. Now, describe to the jury, doctor, Mrs. Fritz' condition. What you observed as she remained in the hospital for the ten day period. What treatment was given and the rest?

A. Our treatment following the operation, leaving out what was done to the leg after that had been fixed, was general medical care to keep her circulation established and keep the lungs as clean as possible, but she was never in very good condition. Actually, I would say, probably no more normal following her - Far more noticeable following the operation. It is a pretty long operation like this and being under anesthetic for that time took a considerable length of time to respond to the anesthesia and I don't think she returned to her room until late

[49] that day and her condition was never good after that with respect to what was done. She got weaker and weaker and her chest filled up and she expired on the third of November, I think it was, in the morning.

* * * * *

Q. Doctor, you said that she didn't seem very good at any time following the surgery. Explain to the jury a little bit more what you mean by that.

A. Well, apparently - What I mean by it is her general condition was not as good as before she was even operated on. Not only before she was injured but before she was operated on, and in the beginning we felt it was more or less natural for a woman of her age to go through this operation that she wouldn't be as good and the fact, too, she had had a previous heart condition and condition of her blood vessels because of her age, too.

Q. How old was Mrs. Fritz at that time?

A. I think seventy-eight.

Q. Doctor, do you have an opinion as to what caused her con-

[50] dition not to be good after the operation as you have described?

A. Caused it not to be good?

Q. Yes. Do you have an opinion as to the cause of her condition as you have described it following the operation?

A. I think the bare fact that she was under general anesthesia for a number of hours is the main cause. Plus the surgical procedure and manipulation they have to go through. Particularly of a person of her age.

Q. Do you have an opinion, doctor, as to the cause of death of Mrs. Fritz?

A. The cause of her death was fracture of the hip was the cause of it, the primary cause of it. Had her hip not been broken we certainly could have assumed she would probably live longer, probably still, but of course, the contributing thing was the diabetes, was her sclerotic heart disease. She had a coronary in the spring but when she was in the hospital this last time, there was no evidence of any new coronary. It showed an old posterior - evidence of an old posterior coronary. That is the report of the men that read the cardiograph gave.

Q. What was the significance of the electrocardiogram reading?

A. What did it show?

Q. What did it show and what was the significance of what it showed?

A. The significance of what it showed was she did not at the time have another coronary, but it did show an old coronary,

[51] evidence of an old coronary condition which she will show, rest of their lives. That is what the --

* * * * *

Q. When was the cardiogram taken?

A. While she was in the hospital.

Q. That is following her hip injury?

A. Yes.

* * * * *

Q. Had the heart made any readjustment following the spring episode?

A. Well, in comparison with the cardiograph she had taken following the coronary in the spring there wasn't much difference in the coronary, this cardiogram we took while she was in there with the broken hip.

Q. What did that show or demonstrate?

A. As far as I am concerned, it showed at least the old coronary condition didn't have any new flareup. We didn't have another coronary at that time.

Q. Did you examine Mrs. Fritz about ten days or two weeks before she was injured?

A. Yes, I think I have testified to that. It was at least within
[52] the two weeks before that because on an average, a couple of times a month, I would see her and check her. The exact dates could be looked up but I don't have it now.

Q. What was the condition of her heart at the time of that examination?

A. All those previous times before she got injured she was, as far as I was concerned, she was doing very well. Certainly her condition wasn't good. She was an old lady and had arteriosclerotic heart difficulties and coronary and diabetes. Certainly the condition wasn't good. She was quite active, moved around, did things that anybody else her age could do.

* * * * *

CROSS EXAMINATION

By Mr. Horowitz:

Q. Doctor Bowie, are you a heart specialist?

A. I am not, but I have been treating them for forty years.

Q. When you first discovered that Mrs. Fritz had a heart seizure or coronary why did you not send Mrs. Fritz to a heart specialist?

A. Because I had been treating them for forty years and I treat my own as a result.

Q. What is your specialty?

A. I do general surgery and I also do general medicine. I have been in both of those since 1926.

Q. Do you remember when you first started to treat Mrs. Fritz?

[53] A. As I said, it was at least twenty years ago. I think it was 1944. I am not too exact [sic] sure.

* * * * *

Q. Did there ever come a time when you gave a diagnosis that she was getting arteriosclerotic heart disease?

* * * * *

A. Certainly, after at least the time she had the coronary in the spring, we knew that she had arterial sclerotic heart disease.

Q. Do you know she had had arteriosclerotic heart disease prior to the coronary in the spring?

A. Well, certainly she would come under the category of arteriosclerotic heart disease because of her age and because of her hypertension, because of the fact that she had diabetes for a number of years. All those patients develop a certain amount of arterio-

[54] sclerosis and if they have that, generally in the heart, it would certainly come under the heading of arteriosclerotic heart disease.

* * * * *

[55] Q. Could you describe to me again what arteriosclerotic heart disease is?

* * * * *

A. Hardening of the blood vessels in the heart.

Q. Doctor, you said that she had diabetes; is that correct?

A. Yes.

Q. Could the diabetes in any way effect her arteriosclerotic heart condition?

A. Very frequently diabetes is one of the causes of arteriosclerosis.

Q. Did it affect it in this woman's case?

A. I am sure it did affect it, in everybody's case. The answer would be yes, of course, it had something to do with it.

Q. You say that in May, I believe, 1964, Mrs. Fritz had a coronary; is that correct?

A. That is correct.

Q. Could you describe what a coronary is?

[56] A. What is it? It is an occlusion of one of the coronary arteries.

Q. What does that mean in less technical language?

A. It is a plugging, a clot, an obstruction.

Q. Are there degrees of coronaries? Moderate, less moderate, bad coronaries?

A. Very definitely so.

Q. What was hers?

A. I would say it was moderate, certainly. It couldn't have been too extreme or it would have killed her, of course.

* * * * *

Q. Doctor, did, to the best of your knowledge, did Mrs. Fritz use a cane?

A. My personal knowledge, no. I don't know that I have ever seen her with a cane in my life. I don't know that she ever - She may have come to the office with one but I don't remember seeing her use a cane.

* * * * *

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[57] Q. You had occasion, doctor, to look at the results of an autopsy that was performed by Dr. Mann?

* * * * *

[63] A. No

Q. You have never looked at the autopsy; is that correct?

A. That is correct.

Q. Doctor, in your experience while you treated Mrs. Fritz, did you know that Mrs. Fritz had ever suffered a stroke?

A. Not to my knowledge.

Q. Not to your knowledge. Let me ask you this, doctor, a stroke, if someone were to have a stroke, what outward manifestations or physical manifestations would come about by the stroke itself?

A. It would depend entirely on how much of a stroke it was.

[64] There are some very mile strokes that would give you no outside symptoms. A stroke is caused from a ruptured blood vessel in the brain. A small little capillary could break and you would have no symptoms at all. One sufficient to give you enough pressure on the brain you would then have a paralysis or weakenss of one side all the way up to the top, paralysis of one side. As far as I know, Mrs. Fritz had neither, small or large, as far as I know.

Q. Doctor, a person that has one coronary, are they more susceptible to having the second coronary than the person having his first coronary?

A. I would say yes.

Q. This woman would have been more susceptible to having another coronary?

A. I would say yes.

* * * * *

[65] Q. Do you know how long the normal life expectancy is? Do you have any idea what the normal life expectancy of a person is?

A. I believe it is in the eighties.

Q. Eighties?

A. Middle eighties, I think is the latest.

Q. Do you believe that this woman with her history, her past history, the past arteriosclerotic heart, would have lived into her eighties?

A. I do.

Q. You do?

A. I can tell you why if you like.

Q. I would be glad to hear it.

A. Because she already got to be seventy-eight. If she was fifty and you asked that question, I would say no. Since she was already seventy-eight, plus the fact she had diabetes for the last

[66] fifteen years before, gone through a coronary before, and her condition was as good as before she had a coronary in the spring and as I say, since she had already got to be that age I would say her life expectancy should have been the same.

Q. Doctor, what is an embolism?

* * * * *

A. Embolism is described - Probably we can understand it, it is a clot in a blood vessel, moveable, I would say. In other words, it got there from some other place.

Q. What is the usual cause of death when someone has had a fractured hip? What usually results when someone dies after they had a fractured hip?

A. It depends - You say usually. It is impossible to answer that. Depends on many things. I think the age of the patient, many things enter into what would cause the death of a patient that has had a fractured hip. What kills everybody, of course, is their heart stops. That is the vital organ that stops.

Q. I am not asking you that, doctor, I am asking, isn't it true that most people, when they die after a fractured hip or when you call cause of death a fractured hip, it is as a result of an embolism or clot that breaks off the spot where the person fractured this hip and goes and up and blocks an artery?

A. No. I answer the same way. In older persons that probably very well may happen. Just the opposite in younger people. That might very well happen also in older people. In an older per-

[67] son that would die from a fractured hip it could come from just a general weakness that is caused - That you have to go through for a fractured hip. Operation, anesthetic, the effect of that has on the heart and the kidneys and the lungs.

Q. To your knowledge, doctor, did this woman have an embolism after the operation?

* * * * *

A. As far as I know she didn't have one.

Q. Doctor, you went to the hospital on the night of the accident; is that correct?

A. Yes. I saw her at the hospital the night of the accident.

Q. What did you observe when you got there?

A. What did I observe? I observed the patient who had pain in her hip.

Q. Did you take x-rays there?

A. Yes.

Q. And the x-rays revealed the fracture; is that right?

A. That is correct.

* * * * *

Q. Let me ask you this, doctor. When you observed Mrs.

[68] Fritz on the night of the accident what condition did she appear to be in other than the fracture of the hip, her general physical condition?

A. She seemed to be pretty well except for the fact that she was in a great deal of pain.

* * * * *

Q. Were you present before the operation?

A. Before the operation?

Q. That day, on October 26.

A. I saw her the morning of the operation.

* * * * *

Q. Were you present when she came out of the recovery room?

A. Yes. I saw her in the hospital later on that day.

* * * * *

[70] Q. Did you ever make a statement to the effect that the woman was never as good again after the operation as before the operation?

A. I don't know if I said it, but I mean it, she certainly wasn't as good after as before.

Q. What do you base that on?

A. Because the general condition was weaker. I expected to be for a while but I was hoping that possibly she might withstand it. She didn't.

Q. She didn't, what do you mean?

A. She died.

Q. You mean she didn't withstand the operation and died as a result of the operation?

A. Died as a result of the operation. Had she never had to take the anesthetic, never been operated on, no broken hip, I would say she certainly would have lived. Wouldn't be any reason why she couldn't have lived longer. I don't know how long she would live.

Q. What does the anesthetic have to do with it?

A. What does the anesthetic have to do with it? Anybody who takes a general anesthetic, certainly weakens the general body and the older person, and the condition that the person is in, the more damage I would say generally to the body.

[71] Q. How did she come out of the anesthetic?

A. What do you mean? She woke up.

Q. How did she come out of it? Come out of it well or come out of it in poorer condition than when she went into it?

A. I think she was poorer from the time she was operated on until her death, yes. I don't think she ever was as good naturally, and as I just told you I think it is more or less natural.

Q. When she came out of the operation was she in shock from the operation?

A. She certainly was in shock for a while. This is the only answer I can give you. She was possibly in some shock. Certainly immediately in shock when you first start waking up, most of them are.

Q. Would you consider that she did have trouble with this operation? Is that what you are saying?

* * * * *

A. I think anybody would have had trouble with this type of operation.

* * * * *

[74] Q. Is it not true, doctor, that she went on for approximately seven or eight days, six days after this operation, progressing nicely and then all of a sudden she did fall down?

A. No. It wasn't all of a sudden. She didn't all of a sudden fall down. She was never real good following the operation.

* * * * *

Q. And yet she was, as far as you were - Was she going downhill or did that happen right at one time that she began to drop off? I don't understand that at all.

A. What I am trying to tell you is that following the operation

[75] she was never as good as before. She never got back to where she was before. She gradually got worse and the last day or two she was that much worse. Certainly that last day she was.

* * * * *

ELIZABETH W. FRITZ

[80] resumed the stand and testified further as follows:

CONTINUED DIRECT EXAMINATION

Q. Miss Fritz, when your mother was in the hospital following her fractured hip as you have described it, did she ever get out of bed and walk around?

A. No, she did not. She was lifted out by orderlies.

* * * * *

Q. Did she ever walk or was she otherwise able to move about under her own power following the operation?

A. No, never.

Q. Prior to your mother's injury, did she ever have a stroke or anything of that kind?

A. No.

Q. Was she ever paralyzed even slightly or partially?

A. No, she wasn't.

Q. Was she ever treated for a stroke or did any doctor diagnose --

[81] A. No. Our physician never said she had one and never diagnosed one.

* * * * *

Q. Were various bills rendered to you for the hospital and medical expenses, funeral bills and the like of your mother?

A. Yes, they were.

* * * * *

[82] Q. Miss Fritz, I will hand you plaintiff's Exhibit 1 which purports to be a bill for surgery for the fractured hip by Dr. Goldstein. Tell us if that is a bill that was paid by you for medical services rendered to your mother.

A. Yes.

Q. What was the amount that was paid? Was it four hundred dollars?

A. Yes, four hundred dollars.

[83] * * * * *

MR. MILLER: Exhibit 1 is Dr. Goldstein's bill and was paid in the amount of four hundred dollars. Exhibit 2 has been withdrawn. Exhibit 3 is a bill from Simmons Brothers Funeral Home in the total amount of eleven hundred forty five dollars. Was that paid, Miss Fritz?

THE WITNESS: Yes.

THE COURT: I understand all of these have been paid. If you would just read them, Mr. Miller.

MR. MILLER: Exhibit 4 is a partial bill from Casualty Hospital, $24.25. Exhibit 5 is a bill of the registrar of Wills at the District of Columbia, Clerk of the Probate Court, for the issuance of Letters of Administration, total amount of $16.56. Exhibit 6 is a bill from the United States Fidelity and Guaranty Company which was the premium

for a bond she furnished as administratrix, the amount of the premium was $10.00

MR. HOROWITZ: Right. That is all I wanted to know, to get in.

[84] * * * * *

MR. MILLER: Withdraw 7. Exhibit 8 is a bill from the hospital, Casualty Hospital, in the total amount of $581.60.

THE COURT: I take it you offer these bills at this time?

MR. MILLER: Yes, I do, Your Honor.

THE COURT: If there is no objection they are admitted.

(Plaintiff's Exhibits 1, 3, 4, 5, 6, and 8 received in evidence.)

MR. MILLER: I offer the relevant portion of the bill, there being matters that is not relevant. I would also like to offer in evidence, Your Honor, the Health, Education and Welfare Mortality Table and ask the Court to take judicial notice of the life expectancy of a seventy-eight year old female of the same description as the decedent, Mrs. Fritz, showing 8.0 years.

MR. HOROWITZ: I object to that, Your Honor, I don't see the

[85] relevancy in this case of those tables. It has to do with as characterized by Mr. Miller, a typical seventy-eight year old woman. She is not a typical seventy-eight year old woman.

* * * * *

THE COURT: Just read it into the evidence. The objection is overruled.

By Mr. Miller:

Q. At the time of your mother's death, Miss Fritz, what was your attained age?

A. I will have to stop and think a minute. Fifty-two.

* * * * *

[86] THE COURT: You are offering the Health, Education and Welfare Table of a fifty-two year old person as well as a seventy-eight year old person?

MR. MILLER: Yes.

* * * * *

MR. MILLER: The expectancy of a fifty-two year old woman is 26.8 years, and for the record the life expectancy of a seventy-eight year old woman is 8 years, 8.0.

* * * * *

CROSS EXAMINATION

By Mr. Horowitz:

* * * * *

[87] Q. Miss Fritz, do you have any brothers and sisters?

A. No, I am an only child.

Q. Are you the only person that is participating in the estate?

A. Yes, I am.

Q. And if there is a judgment rendered in this case, you will be the only one that will render - Benefit from this judgment.

A. Yes, that is true.

Q. Miss Fritz, did your mother ever work?

A. No, she did not. She was a housewife.

Q. And you say that your father died in 1960; is that correct?

A. Yes, August 23, 1960.

[88] Q. What was the annuity - I believe it was annuity check he left?

A. Yes. He worked for the Government at the United States - Former United States Naval Weapons plant and he made it possible for her to receive half of his annuity so she would have something.

Q. That was $207.50?

A. A month.

* * * * *

[89] Q. In 1964, at the time of your mother's death, were you a school teacher?

A. Yes, I was.

Q. You are still a school teacher?

A. I am.

Q. Approximately what were you making in 1964?

A. I would say approximately five or six thousand dollars a year.

Q. But that was without any of the federal taxes.

A. D. C. taxes and other things removed.

Q. I think we all knew that. Five to six thousand dollars.

A. On paper.

Q. And what were you doing with your five or six thousand dollars?

A. I was living with my mother and doing things that she would want me to do.

Q. You all lived in the house; is that correct?

A. Yes, it is, a private residence.

Q. Is the house paid for now?

A. Now, it is not.

Q. On your mother's death, who did the house go to?

* * * * *

[90] A. I am sole heir.

* * * * *

Q. So the house went to you; is that correct?

A. Yes.

Q. Is the house paid for now?

A. No.

Q. And how much are the payments?

A. Approximately one hundred and fourteen dollars a month.

Q. And in 1964 they were one hundred dollars a month; is that correct?

A. Yes. Taxes have risen.

Q. Excuse me?

A. Taxes have risen.

Q. Yes. In 1964 your mother was paying one hundred dollars a month?

A. Yes.

Q. So you were living rent free in effect, is that correct?

A. No, I wouldn't consider it rent free because she wanted to have me live with her. Many daughters and sons live with their parents and they do other things to reciprocate.

[91] Q. How did you reciprocate?

A. I took care of the food in the house.

Q. What was the cost of the food per month?

A. Approximately forty dollars a month at that time.

Q. Forty dollars per month.

A. Maybe. It could have been a little more. I couldn't swear for it.

Q. What else did you take care of in the house?

A. This is a little hard to remember.

Q. You were able to remember what your mother took care of.

A. Her part was a little bit more - Has been a little bit more in my mind. Once in a while we would go out to dinner and I would take her out to dinner and she would reciprocate and do the same for me.

Q. Who took care of the drugs?

A. I took care of all prescriptions and drugs for her and for me.

Q. Approximately how much was that per month?

A. Around fifty dollars a month.

Q. What about laundry?

A. That, too, I took care of, and that run, I would say - We have someone who helped my mother in the housework, the heavy work that is, I mean, washing windows which neither she nor I could do and that was approximately nine dollars a week.

Q. Would you say thirty-six dollars a month?

[92] A. Yes.

Q. And you would take care of that?

A. Yes, that is true.

Q. What about clothing?

A. She purchased and took care of her own clothing.

Q. And you purchased and took care of your own clothing; is that correct?

A. Yes, I did.

Q. Is there anything else you can think of that you contributed toward helping your mother?

A. I had an automobile and I took her places in the automobile. If a daughter or son has an automobile they often take their parents out for a ride and I assume - I am no different that anybody else. I did the same.

Q. Well, as I understand it, Miss Fritz, I am not trying to be mean now, I am trying to say it the way I see this. Things pretty well balanced out, didn't they, so that your mother contributed a certain amount to you and you contributed a certain amount to your mother every month? Is that not correct?

A. I would say - I helped maybe a little. She did all the house. It was her home and she wanted to make it that way. She wanted me to live with her.

Q. If you had not lived with her would she have been able to get along?

A. Probably in a small apartment.

[93] Q. But not in the house; is that correct?

A. No. It wouldn't have been possible.

* * * * *

Q. Let me put it this way; when your mother died, on her death, you paid out certain expenses?

A. Yes.

Q. And your mother had paid certain expenses --

A. Yes.

Q. --for you.

A. Yes.

Q. Now, you did not have to --

A. I continued and I took over the house.

Q. You continued and you took over the house.

A. That is right.

Q. But you did not have to pay the expenses for your mother that you would have had to pay or were paying before her death even though you did it lovingly and kindly because you were her daughter.

[94] A. I don't quite get your train of thought.

Q. Part of the laundry was your mother's laundry per month; is that right?

A. It was household, yes.

Q. And you paid for it.

A. Yes.

Q. So on your mother's death the laundry bill went down?

A. No, it hasn't. It continued the same.

Q. There were things in the laundry that your mother put in the laundry.

A. Yes, I am quite sure.

Q. And the food bill must have gone down.

A. Not with the prices of today.

Q. Now, we are talking about the prices then. She ate one-half of the food and you ate one half; is that correct?

A. I would assume so. That is what usually happens when there is two in a family.

Q. And the drugs the same way?

A. No, the drugs have been a little bit more expensive because I have been under cortisone.

Q. But the prices have gone up?

A. Yes, extremely. They have soared.

Q. What was your mother's general condition before the accident, let's say.

A. In my estimation, very good.

* * * * *

[101] Q. You have been saying the whole time that the grass was full of leaves.

A. That is correct.

Q. And the lighting was poor.

A. Yes.

* * * * *

[104] Q. Did you notice on October 18th that a tree had been removed?

A. Yes.

Q. You knew --

A. No one could see a hole there.

Q. You noticed a tree had been removed?

A. Yes, it had been removed some time.

Q. It had been removed some time.

A. Yes.

Q. Had it been removed the last time you came there before that?

A. I couldn't say that, but I am sure the tree had been removed.

Q. And you saw no hole there; is that correct?

A. When it is covered with leaves you can't see any hole.

Q. You don't know whether there was a hole there or not on the Sunday before?

MR. MILLER: I think I will object. This is argumentative. The District has already, in their answers to interrogatories

[105] stated they removed the tree which had been planted in the spring.

THE COURT: Overruled. You may answer. Read the question.

(Question at line 22 on page 104 ready by reporter.)

A. That is exactly right. I don't know which side I parked on that Sunday and I don't believe people remember exactly from one Sunday to the next where they park their car when they go to church.

* * * * *

[109] Q. Was your mother overweight?

A. Might have been a little bit but not too much. She was around about 160 pounds, I would say, between 150 and 160.

Q. And five foot three; is that correct?

A. Approximately, yes.

* * * * *

[110] Q. What was the general condition of your mother that you observed?

A. Not too good. She had very little to say and she was always one who was very happy, gay, witty, but this wasn't a funny experience

at all. She was enduring what she usually has to endure but if she wasn't happy about it like anybody else would be. That night I had asked someone to give her a hypo or some pills to make it possible for her to sleep and they gave her a hypo. It had no effect. The next morning, on Sunday, I was there, in the middle of the day and she said she hadn't slept at all, all night long. There was quite a long night. I re-
[111] member her telling me and then about the middle of the afternoon I think they came and put her leg in traction. When they did that she felt a little better but still her looks didn't make me feel that she was comfortable and she wasn't a bit. She wasn't witty, wasn't kidding, wasn't laughing at all.

* * * * *

[115] WILLIAM F. FARRELL

called as a witness by and on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Father, tell the Court and jury your name.

A. I am Father William F. Farrell.

* * * * *

Q. Directing your attention to October 24, 1964, which is the date that Mrs. Fritz sustained an injury, were you at or near

[116] the church at that time?

A. Yes, I was.

Q. At the church located up on Massachusetts Avenue?

A. Yes, Church of the Annunciation. At 3810 Massachusetts Avenue.

Q. We have a diagram on the board which shown the location of the church and the sidewalk and so forth. Is that consistent generally with the area as it existed at that time?

A. Yes; that is correct.

Q. Father Farrell, what, if you remember, brought your attention to anything unusual on that day?

A. Well, I was returning to church from the rectory some time after seven, about seven-fifteen or so in the evening, for evening confessions and I was driving past the front of the church on Massachusetts Avenue when I saw some commotion there. I realized there was something going on in front of the church so I parked the car and I saw that a woman had fallen and Miss Fritz was there with her mother trying to get her up. She had fallen down and I helped her with her mother to get her into the car.

Q. Did you proceed immediately to where Mrs. Fritz was?

A. Yes, I did.

Q. Could you tell us where that was?

A. She was on the grass between the curb and the sidewalk.

Q. Was she near any particular area there?

A. Well, she was close to the front of the church.

[117] Q. I mean the area of the ground. What did you see when you got there?

A. When I got there I realized this woman had fallen and she had apparently been thrown off balance by a hole that existed in that particular --

Q. Did you see the hole?

A. I saw the hole, yes. It was pretty well covered over with leaves. It was fall, of course.

Q. Describe that hole and its appearance, dimensions, please.

A. Well, it was about six to eight inches deep, I would say, and maybe about two feet wide. Quite a large hole, actually, but it was hidden, the leaves.

Q. Was Mrs. Fritz near the hole when you first got up there?

A. Yes. Actually, that is what caused her to fall, you see, and I was trying to get her up from that position into the car and it was

very difficult thing to do because she was dead weight. We didn't know exactly what her physical condition was but it was not good because she was in terrific pain. She was in an awful lot of pain, and if even getting her to sit into the car was very difficult and we couldn't - The only way we could do it was to have her sit sideways and try to straighten her out. With just the two of us it was quite a difficult proposition, because every time we moved her she was in obvious agony.

Q. What was her position at or near the hole when you first

[118] saw her.

A. As I recall - She had stepped into the hole and had fallen. She was very close to it.

* * * * *

Q. Do you recall who it was that swung Mrs. Fritz' legs in from the sideways position when you were putting her back in the car?

A. Yes, I did that. That is how I knew how badly she was injured. Although I didn't know what she had broken but I knew something was wrong because as soon as I touched her she was in utter agony.

Q. How did she manifest the agony that you observed?

A. Through her emotions, you might say, or her - And also the grimacing with pain.

* * * * *

[119] Q. Were you present later in the evening when the police officer from the District of Columbia came to the scene?

A. Yes, I was.

Q. Was anyone else present beside yourself?

A. Father Dooley was with me at that time.

* * * * *

CROSS EXAMINATION

By Mr. Horowitz:

* * * * *

[121] Q. Father, how long had you been in the Church of the Annunciation prior to the accident, how many years?

A. I had been assigned there in June of 1964.

Q. So you had been there three or four months, is that correct?

A. That is correct.

Q. Where were your sleeping quarters, sir?

A. My sleeping quarters were in the attic on the - We call it the third floor, I call it the attic.

* * * * *

[123] Q. Now, this hole, six inch hole you say that Mrs. Fritz was around when she fell.

A. Yes.

Q. Had you ever seen this hole prior to the time she fell?

A. I had never noticed it, no.

* * * * *

[124] Q. When people came to church did they come straight up the walkway or would they sometimes come over the grass portions?

A. They would very frequently come over the grass portions because they parked all along Massachusetts Avenue so they would walk across the grass to the sidewalk.

* * * * *

[142] ANDREW BOWIE

resumed the stand and testified further as follows:

* * * * *

FURTHER CROSS EXAMINATION

By Mr. Horowitz:

* * * * *

[160] Q. Doctor, you stated at the time she went into the hospital she had gotten over the coronary; is that correct?

A. She had gotten over her coronary.

Q. Right. She had.

A. I don't know that I said she had gotten over it. I said she did as well as anybody of them do and she was getting around almost as usual, when I saw her.

Q. As well as any of those that have a coronary; is that correct?

A. Yes, I will say that, certainly.

Q. In other words, she was taking medicine; is that correct?

[161] A. Yes.

Q. Was her heart condition prior to the accident tending to make her life span shorter.

A. Would it tend to do it? You have to say yes. As I say, you would have to say yes. It doesn't necessarily have to do it but you have to say yes.

Q. What about the arteriosclerotic heart condition combined with the other conditions she had?

A. Would it tend to shorten it some?

Q. Right.

A. You would have to say the same answer. Yes. It doesn't have to necessarily.

Q. Diabetes is what I am thinking of?

A. Yes.

Q. Would it tend to shorten it?

A. You would have to say yes.

* * * * *

[163] REDIRECT EXAMINATION

By Mr. Miller:

Q. How long have you been treating patients with heart conditions?

A. I have been treating ever since I have been out, which was 1926.

Q. I believe you were asked questions with reference to a stroke. Had you been the attending physician and the family doctor of Mrs. Fritz for the long period of time you described?

A. I was.

Q. Did you ever see any indications of any kind of stroke?

A. No, I never did.

* * * * *

[164] Q. Doctor, in your opinion, was the hip injury that she had and the bone operation and so forth, was that a permanent injury?

* * * * *

[166] A. Yes, I would say it was a permanent injury.

Q. If she had not died, she would continue to have permanent disability in that area?

A. She certainly would have some.

* * * * *

[174] Q. If I understand you, there are two aspects of such an operation as this which has a harmful effect upon the human body; is that correct? One pertaining to the anesthesia and the period of time it is given and the other is the surgery?

A. That is right. One is mechanical and one naturally affects the circulatory system. You are unconscious the whole time. You sleep from an anesthetic. That doesn't do anybody any good as far as the brain is concerned.

* * * * *

[178] Q. You have been asked questions on cross examination and I will not try to go over them. Were things, questions, or matters called to you attention on cross examination that have changed your opinion that the cause of this woman's death was her fall, fractured hip and the operation?

A. There is no change in my position.

* * * * *

WILLIAM H. HOFFMAN

[179] called as a witness by and on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Tell the Court and jury your name.

A. William H. Hoffman.

Q. And what is your title?

A. I am pastor of St. Patrick's Church.

* * * * *

Q. Father, did you have occasion to observe a hole in the area between the curb and the sidewalk here at the church up on Massachusetts Avenue? Did you observe that situation?

A. Yes.

* * * * *

Q. Could you describe that hole for us?

A. I looked at it particularly the day after the accident and it was the fall of the year, I remember distinctly, the leaves in the hole and around it, surrounding grass, so I could realize it was quite easy for someone to fall in it.

Q. About how deep was the hole?

A. Oh, I would judge maybe nine inches, something like that.

Q. About what was the diameter?

A. Maybe a foot and a half.

* * * * *

[180] CROSS EXAMINATION

By Mr. Horowitz:

Q. Father, when was the first time you noticed this hole?

A. The day after the accident.

* * * * *

[189] WILLIAM LAWSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

Q. Tell the jury you name, please.

A. William Lawson.

MR. HOROWITZ: I will object to any testimony from this man whatsoever. According to the pre-trial statement and the list of names of anybody that is going to testify in this trial were supposed to be supplied to me by a certain date, and this man's name was not on the pre-trial list.

MR. MILLER: It is Mr. Salisbury from the Metropolitan Life Insurance Company, actuarial, nothing to do with the transaction. I ask leave to call this witness.

MR. HOROWITZ: Mr. Salisbury, he is not on the list either.

MR. MILLER: He was one of the witnesses when we started the trial.

MR. HOROWITZ: I had to strike somebody from my witness list because I tried to add them after the date.

[190] THE COURT: Come to the bench.

(Out of the hearing of the jury, the following proceedings were had:)

THE COURT: What is he going to testify to?

MR. MILLER: Simply the present value of the various figures that is arranged in the evidence as to the amount of money contributed to the daughter over a period of time. That is what we are required to do under the reduction of present market.

MR. HOROWITZ: Your Honor, I had an expert, a doctor, in this case who I didn't add to my witness list. I attempted to add that doctor to the list approximately a week before this case was supposed to go to trial. The pre-trial judge at that time ruled I could not add this man's name to the witness list as a witness and I could not call him and neither could Mr. Marshall. Now I am completely surprised by this witness.

THE COURT: You had an opportunity to - What is he?

MR. MILLER: Actuary.

THE COURT: Why didn't you have him on your list before?

MR. MILLER: I didn't know. I think that - I was thinking of putting in a table and it is much easier to have him explain it to the jury.

MR. HOROWITZ: You have allowed the table in. The table is in.

[101] MR. MILLER: The present worth tables. You have to show what is the present worth of XYZ.

THE COURT: Can't the jury figure that out?

MR. MILLER: It is hard for them to do and it gets confusing. It is within your Honor's discretion. On this doctor, I don't care about the doctor. He isn't here now. The reason was not as counsel said. Not because he is on the list. I gave a notice to take his deposition, and they objected to it and when they objected to it before Judge Gazell and then I said if we can't take his deposition he shouldn't be added.

THE COURT: What are you going to do with this man?

MR. MILLER: Purely statistical.

THE COURT: I don't think I would permit him as long as he wasn't mentioned.

MR. MILLER: May I make an offer of proof because I think I have to in a death case. These tables get complicated and I think in fairness to the court and the jury that is all he is going to testify to. He is not surprising anyone. If I got a table out of Am. Jur., this is

a bunch of figures, trying to explain it to a jury, trying to understand it myself is confusing. This is the way of the interest of justice.

MR. HOROWITZ: The evidence is before this jury without somebody else, as far as I am concerned, making --

THE COURT: All right. Do you want to make your offer of proof? Go ahead and dictate it into the record.

[192] MR. MILLER: I offered to prove by the witness on the stand who is with the Metropolitan Life Insurance Company, and familiar with the methods of figuring the present worth of money or to put it in the terms of the very instruction Your Honor has been shown, the amount of money that must be deposited presently in order to produce a given sum of money annually, over a given number of years. I propose to prove by this witness that $150.00 per month over a period of eight years has a present worth of $13,014.00, which is the same as the amount of money that would have to be deposited presently in order to produce this amount of income over that period of time, using the appropriate tables which are standard which are used by his and all other life insurance companies. I offer further to show that the witness would further testify in response to appropriate questions that to produce $150.00 a month for a period of six years would require the present deposit of $10,044.00, which is the same as the present worth of the

larger amount of money at that monthly rate. I offer to prove further that the witness would testify in response to appropriate questions that the sum of $140.00 per month would be produced over an eight year period at the - By the present deposit of $12,145.40, which again represents the present worth of the larger sum, and that finally, he would testify that the sum of $140.00 per month, for a six year period, would require the present deposit of $9,374.40, which again is the
[193] present value of the larger sum of money that is produced. I submit this as purely statistical, but by the use of an appropriate table probably the jury couldn't really figure out as such even though Your Honor instructed them in detail as to the mathematics of it. This is normally done, and should be done in a death case or permanent injury case which Your Honor has certainly full discretion of - If he testifies explain to the jury how it is done, if anyone desires to - These are to be the amounts.

MR. HOROWITZ: Your Honor, if I had had the opportunity to know that this person was going to be called I would have been able to prepare myself for a man who came forth with the actuarial table. That is number 1. Number 2, I would then have to give this man some figures of my own such as the testimony that Miss Fritz, Mrs. Fritz' daughter testified to about what she supplied as far as money, toward

prescriptions was concerned, as far as money toward laundry was concerned, as far as money toward food, I believe, was concerned, so that I think this tends to get the jury more confused in this particular instance. I think an instruction to the jury would probably suffice perfectly well, especially since I had no notice this person was going to be called.

* * * * *

[194] THE COURT: I am going to stand on the ruling that you will not be permitted to call this witness. I think the record should show that he is an actuary. I believe you stopped the record, before the jury, when his name was stated. We didn't get his occupation. But keeping with my understanding of your pre-trial rule, that is the effect of the matters that are disclosed and the witnesses disclosed at pre-trial conference, because of the surprise that would be attended with this witness and the inability of the defendant to call his own expert.

* * * * *

MR. MILLER: I am going to ask leave to put in an appropriate table which is what they often do.

[195] THE COURT: I would permit you to offer the tables.

MR. MILLER: What I need to do is get to the bar library downstairs where the Am. Jur. desk book does have these tables. I have one here I will offer but I think I need the whole set.

THE COURT: Do you have objection to these tables?

MR. HOROWITZ: I have objection to them.

THE COURT: What is your objection to the tables?

MR. HOROWITZ: My objection to the tables is that they are not relevant in this particular instance as they will just add confusion to this particular case, especially if an actuary is not here to explain it to them and an actuary should be here to explain it to them. If I had known the actuary was going to be here --

* * * * *

[196] THE COURT: I am going to reserve the ruling on the admissibility of the tables until I see them, what they are. I want to see your authorities. You say you have Supreme Court authorities?

MR. MILLER: I don't have it with me.

* * * * *

[198] MR. MILLER: May I ask counsel a question through the court?

It has to do with the fact there are answers to interrogatories that have been filed by the District. Is there any contention that the District did not either originally plant the tree and then remove it? That is what the answers to interrogatories show.

MR. HOROWITZ: No. The answers to interrogatories don't show we planted the tree. Look at the answer. It merely shows we removed the tree.

MR. MILLER: That you removed it.

MR. HOROWITZ: The tree was removed. There is no question about that. That we removed it.

MR. MILLER: I wonder if perhaps I should introduce portions - Here again, I am going by our own practice. There are answers to interrogatories that I want to - Answers as admission, only portions, it is not self-serving matters in the same area.

THE COURT: If you think it belongs in the case I would permit you to read them into the record. I think the appropriate time to do it is now and then if you would announce your resting subject to a matter of additional exhibits, then we can take up the motion.

[199] (In the hearing of the jury, the following proceedings were had:)

THE COURT: Mr. Lawson, you may return to the witness room for the time being.

(Witness excused.)

MR. MILLER: Your Honor, there is a matter I would like to offer into the record relating to a portion of answers to interrogatories.

THE COURT: You may read them into the record so that the jury may hear them. Identify the person being interrogated and the interrogator.

MR. MILLER: The interrogatories to the District of Columbia read as follows: "State the date the tree mentioned in the Complaint was planted, the date it was removed." That is the portion. And I wish to read in the portion of the answer which is as follows: "A small tree was planted at the subject location on March 18, 1964. On October 16, 1964, said tree was removed."

MR. HOROWITZ: Your Honor, if he is going to read in an answer to interrogatory I think he should read the whole answer.

MR. MILLER: I mentioned to Your Honor I believe I had the right to read in the portions I contended are admissions.

THE COURT: If you wish to read the balance in, Mr. Horowitz, you may do so.

MR. HOROWITZ: I will read the answer to the whole interroga-

[200] tory.

THE COURT: How long is this?

MR. HOROWITZ: It is not long. He left out a few words.

THE COURT: Proceed.

MR. HOROWITZ: Question Number 8; is that correct?

MR. MILLER: Yes.

MR. HOROWITZ: "A small tree was planted at the subject location on March 18, 1964 by William Rhinehold, landscape contractor,

206 Telegraph Road, Flat Rock, Michigan. On October 16, 1964, said tree was removed and the ground was filled in on the same date. A replacement tree was planted on March 25, 1965." That is the whole answer.

MR. MILLER: If the Court please, I think subject to an offer that was made at the bench, I wish to keep open my - The offer of proof, but in addition certain tables which I have asked the Court to take judicial notice of and so forth so I wish to keep the proof open in this regard.

THE COURT: Subject to those two items does the plaintiff rest?

MR. MILLER: Yes, Your Honor.

[207] * * * * *

THE COURT: The Court will take the motion under advisement, gentlemen. You submit your tables and other matters to me in chambers in the morning at 9:30.

* * * * *

[209] THE COURT: Let the record show that counsel for the parties met in the Court's chambers outside the presence of the jury before commencement of the trial this date, to take up certain matters that were indicated in court yesterday. Mr. Miller, I believe you have a matter of tables that we were considering, some of your authorities for the admissibility of these tables.

MR. MILLER: Yes. I will identify first the tables taken from the Internal Revenue Bulletin, Accumulative Bulletin, 1958-2, put out by the Treasury Department, Internal Revenue Service.

* * * * *

THE COURT: The estate tax regulations. Are these the estate tax tables?

MR. MILLER: Yes. Showing tables, showing present worth at three and a half per cent annuity for a term certain or of remainder interest which is not involved here for a term certain. Shows the number of years. Years a8, for example, shows the annuity cost, it would be 6.8740.

* * * * *

[210] MR. MILLER: So we look at the column of years, and the column annuity, I have selected eight, hypothesizing 100 a year, you multiply 6.8740 times 1200. That would then give you the amount of the money that had to be presently deposited which would produce 100 a month for eight years. Variability into the factor of three and a half per cent interest, and so forth.

[211] THE COURT: In other words, taking your eight years' basis that would be 6.8 roughly or 6.9 times your 1200. Is that right?

* * * * *

MR. MILLER: I have it figured. It is a matter of multiplication. I have figured on eight years comes to 12,373, happened to calculate it on eight, on the eight at the rate of $150.00. But it is true, the formula is true whatever figures would be used.

THE COURT: You made your basis on your figures on the testimony of the --

MR. MILLER: Of the plaintiff.

THE COURT: To the effect the mortgage payment made by the mother was 100 dollars a month, plus the other items that the mother paid for.

MR. MILLER: Came to 155 plus some services which were performed around the house, travel, that kind of thing, which have been held admissible in a death action. But I simply took 150 as rounding off and being somewhat below the maximum she testified.

* * * * *

[212] THE COURT: After we get to this point I am still concerned by the fact that this table was not mentioned at pre-trial. The Health, Education and Welfare table was.

* * * * *

[216] MR. HOROWITZ: Yes. I have looked into this. I talked to an actuary last night who, by the way, is not from the District of

Columbia. The District is in a position here where first of all I would like to know, since you have ruled against them using the actuary himself, how they are going to put the actuary tables into evidence, and explain the actuary tables. I know that if I had a weather chart, United States weather chart, and I tried to put that in evidence, I could put that into evidence because you would take judicial notice of the United States weather chart but that would be all there would be to it unless I had an expert there to testify as to what the contents of the chart were. Now, I don't think Mr. Miller is qualified to testify as to what an actuary table says. I don't really understand an actuary table. The

[217] only person that might be qualified would be an actuary, and the actuary is not present to testify.

I also would say this, Your Honor, that there were expenses that Mrs. Fritz was allegedly giving to her daughter, there was money that Mrs. Fritz was allegedly giving her daughter, and there was money that the daughter was allegedly paying out for her mother. Now, I would have to take these tables and use them myself to add up the sums of money that were given from the daughter to the mother and then subtract or add, depending on whichever came out more. When we went down to these mortality tables and these actuary tables, also, I think that in this particular instance they are completely meaningless. The

real question in this case is how long did this woman have to live. If she had any time to live whatsoever, and it is up to the jury to decide how long they thought this woman had to live. Definitely, she didn't have eight years to live, which is normal as the actuary said to me. The average future life time of a group of average individuals is the way that they decide this. Also, there are many different actuarial tables. There are many different mortality tables. They picked a particular HEW mortality table and insurance companies have a different mortality table with its people with heart conditions.

* * * * *

[218] THE COURT: Now, I would look to these tables in the same vein that they are not binding on the jury but they are merely a tool that the jury may use in arriving if they conclude that the [219] woman - They might conclude she was going to live 15 years. I don't know. They might conclude she was going to live a year, six months. Whatever their determination might be. Again, this would be merely a tool that they could use.

MR. HOROWITZ: Let me ask you this: Who is going to put it into evidence?

THE COURT: This raises, I think, a pretty elementary question, and I wondered about that. Is your actuary still here? Is he available?

MR. MILLER: He is not here. He is about an hour away because he is in Maryland. However, by taking judicial notice of the table, counsel in argument to the jury can select whatever they wish. In other words, the table itself is easy to use once it is explained. Just like the life expectancy table. Just simply a guideline. That is the extent.

THE COURT: I would be inclined to admit it, take judicial notice of the table. I think in fairness to the jury they should have the table from zero to eight.

MR. MILLER: The whole table.

THE COURT: The whole table.

MR. MILLER: I want the U. S. Government's to be offered. I think it is a standard table to be entitled to judicial notice. I think the record would be better if I use the table shown to Your Honor.

[220] THE COURT: Based on the judicial notice statute, I would have little doubt that judicial notice could be taken. I do believe that at least zero to eight should be included.

* * * * *

THE COURT: And here you have the three and a half per cent. I don't know how you arrived at that. Is that the prevailing interest rate in this?

MR. MILLER: That is what they deem it to be when the table was prepared by Internal Revenue Service.

THE COURT: What date is that? I think the interest rate is really the prevailing interest rate in the District of Columbia, isn't it?

MR. MILLER: I think it is not quite that, because I think there again the jury selects --

THE COURT: I understand that. Isn't this the guideline they must search for, is the prevailing interest rate as of the date of the verdict?

MR. MILLER: If I am understanding Your Honor properly I think the cases say one should be able to invest this without getting any profit from the investment. A person who doesn't know anything about it is going to put it in a secure place, and that is a lower interest. [221] That is why the Government selected three and a half per cent.

It is not quite what you can go out and get but simply an ignorant person, so to speak, would - isn't going to get any extra money because of the investment, who wants maximum security and guarantee that the funds will be totally used and paid out in intervals as designed. That is why it is three and a half per cent and they don't shop around for --

MR. HOROWITZ: May I say this. I still have my basic objection. If this is the way it is going to be, let me ask. I do not really under-

stand these tables. Mr. Miller understands it much better that I. I count up $126.00 per month that Miss Fritz says that she paid out for her mother, Mrs. Fritz. Now, I think the $126.00 per month should also be put on this actuary table and they should be given both figures.

MR. MILLER: What they do, they multiply --

THE COURT: You can do that in argument. Isn't that what you plan to do in argument?

MR. HOROWITZ: If I know how to work the tables.

THE COURT: Isn't that simple. If your argument would be - First of all, she was going to die anyway.

MR. HOROWITZ: Right.

THE COURT: And she had no expenses and this is really your a- I guess the crux of your dispute, and you can assume she [222] was going to live for a year under her condition, then you take Number 1, that is point 96 times your 120 or 126, times 12, which would be 1200. Nine-tenths of 1200, it would be 126 times 12.

MR. MILLER: And nine-tenths of that. It is merely an argument. Certainly the jury has to be instructed this is not binding upon them, and this does not mean that Mrs. Fritz was going to live, or even longer --

MR. HOROWITZ: When you put in this evidence are you going to put it in evidence and tell what your figure is?

MR. MILLER: I plan to argue my figure.

MR. HOROWITZ: We can both use it.

THE COURT: You will have this much of the page Xeroxed.

MR. MILLER: Furnished to counsel as well as the Court.

THE COURT: Yes, and made for an exhibit and I will permit that.

MR. MILLER: For the record might I identify the page then? May the record show that we are asking the Court to take judicial notice, I am offering into evidence, Table 2, Roman numeral 2 which appears on Page 489, under Section 200.1, of the Internal Revenue Bulletin, Accumulative Bulletin Number 1958-2, and I am offering that portion of the

Page which consists of a statistical table showing the present

[223] worth of three and a half per cent of annuity for a term certain, containing the number of years which might be applicable to such annuity from one through 30. I will make copies available to counsel and I will submit it to the Court to take judicial notice. Xerox of that page.

THE COURT: Very well, and the Court does notice the table stated by counsel and will admit such exhibit in evidence.

MR. HOROWITZ: There was this matter about my motion for directed verdict.

THE COURT: Yes. On the motion for directed verdict, the Court has considered the motion and it is overruled.

Anything further we want on the record?

MR. MILLER: No.

MR. HOROWITZ: No.

(In the presence of the jury the following proceedings were had:)

THE COURT: Mr. Miller, I believe you had a matter which you wanted to proceed with this morning before you rested.

MR. MILLER: Yes, Your Honor. I wanted to ask the Court to take judicial notice of the annuity table which is Table 2 of the Internal Revenue Bulletin, Bulletin No. 1958-2, at Page 489, consisting of a table showing the present worth at three and a half per cent of annuity for a term certain, which contains then the various numbers of
[224] the years and the multiplying factor from which those amounts can be derived mathematically. I will provide a Xerox copy to the Court for the purpose of taking judicial notice, and to opposing counsel.

THE COURT: Mr. Horowitz?

MR. HOROWITZ: I object to this due to the irrelevancy, as we contend this woman had no time to live.

THE COURT: The Court will take judicial notice of the table offered and if you would prepare the copy, Mr. Miller. Mr. Clerk, what exhibit number would that be?

THE CLERK: Plaintiff's Exhibit No. 9.

* * * * *

MARION MANN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horowitz:

Q. Dr. Mann, would you tell the Court your name and occupation?

A. The name is Marion Mann. I am a medical doctor and a pathologist.

* * * * *

[227] Q. What is your specialty?

A. My specialty is pathology.

* * * * *

[228] Q. Doctor, in November of 1964 is it not correct that you were the coroner for the District of Columbia?

A. Yes.

Q. Did you have occasion on November 4, 1964, to perform an autopsy on one Elizabeth Fritz?

A. Yes.

* * * * *

[235] Q. Tell me what you found as a result of the performance of this autopsy.

A. My autopsy examination of Mrs. Fritz showed there was, in the brain, an old - I might say I will give it in medical language and then I will try to explain it in more understandable terms. There was an old cystic cerebral infarct.

MR. MILLER: I am sorry, I didn't catch the first word. An old --

THE WITNESS: Cystic cerebral infarct. In the right globus palidus of the brain. What this means is that there was an old

[236] softened yellowish-brown dead area in the brain. This is generally caused by arteriosclerosis, hardening of the arteries and blood cannot pass through the inside of the artery to get to the area that it is supposed to serve, and that little area therefore dies from lack of blood supply. What I mean to say is that this area dies while the person is still living and the medical term for that is infarct. I did not

find in the brain, any evidence of recent injury or any other recent abnormality.

By Mr. Horowitz:

Q. Doctor, did you come to the determination of what exactly this was?

A. It was an infarct and --

Q. Is there another word for infarct?

A. Well, the simplest word would be to call it an area of dead tissue in the brain as a result of it having lost its blood supply because of arteriosclerosis.

Q. Is it the same thing as a stroke?

A. Yes, this is a form of stroke and probably more understandable by that term.

Q. Approximately - can you approximate how long that had been there?

A. Only roughly. I would say probably a matter of months because one term that I used previously was it was cystic. That means that this was, say a rounded area containing fluid and these infarcts do not liquify [sic] in a short period of time. It takes weeks and [237] months. So that when one examines infarcts and finds the contents are fluid, he can time it in terms of let us say months, at least.

Q. Proceed with what else you found in the autopsy.

A. The examination of the lungs showed some small pulmonary emboli in the tertiary branches of the pulmonary artery. And other areas of the lungs were congested.

* * * * *

Q. Could an emboli occur as a result of a fractured hip?

A. Yes.

* * * * *

Q. Doctor, you can just continue with what else you found in [238] the autopsy.

A. My examination of the heart showed that there was severe coronary arteriosclerosis with total occlusion of the anterior descending branch of the distal half of the right coronary artery. If I might just stop to explain that. As you know, the heart is full of blood but the heart is also a tissue and it needs a blood supply just like every other piece of flesh in the body, and for this purpose it has its own special arteries called coronary arteries and there arteries may show arteriosclerosis. And by the way, there are several main branches. One of these is anterior descending branch and one is the right coronary artery. Both of these were serious [sic] affected by this arteriosclerosis even to the point of the whole of the inside being completely blocked up. So

this is a severe form of heart disease. In addition to that, I found in the left side of the heart a hard, gray area of scar tissue. This scar tissue was a result of a previous heart attack. A previous myocardial -

myocardial means heart muscle. A previous infarct of the

[239] heart muscle from which the patient did not succumb at that

but it healed and in healing it left this scar that I saw at the autopsy. So, putting this together she had a severe type of heart disease with a scar in the heart which to my opinion occurred several months ago as a result of this blocking up of the blood vessels which supply this heart muscle.

Q. Doctor, could you tell from the results of your autopsy for approximately how long the arteriosclerotic heart disease had been present in this woman?

A. I think the arteriosclerosis had been present for years. That is the gradual decrease in the size of the hole in the blood vessel. The scar on the side of the heart was a matter of several months old in my opinion.

Q. Doctor, before we go further, let me ask you, would the presence of diabetes, a woman having diabetes, in any way have an effect on arteriosclerosis?

A. Yes. Diabetes has a bad effect on arteriosclerosis in that the arteriosclerosis is more severe and progresses more rapidly.

* * * * *

[244] Q. Under part 2, "Other significant conditions," can you read what you wrote there?

A. Under part 2, other significant conditions contributing to death but not related to the terminal disease condition given in

[245] part A, "Fracture of the right hip."

Q. Doctor, I show you defendant's Exhibit No. 1 for identification, this is the District of Columbia's. This purports to be the hospital record of Mrs. Elizabeth Fritz. Will you please look at that. Would you please turn to the third page. Does this deal the the defendant's [sic] physical examination on entrance into the hospital?

* * * * *

[255] CROSS EXAMINATION

By Mr. Miller:

* * * * *

[256] Q. Do you have any other records? I notice from time to time you looked at other papers.

A. I have the record of who made the identification of the body. I have a short summary of the police investigation.

* * * * *

[268] A. I did the autopsy the day after death.

Q. Where did the autopsy examination take place?

A. At the District of Columbia coroner's office, 19th and E Street, Southeast.

Q. That is owned and operated by the District of Columbia?

A. Yes.

* * * * *

[298] Q. Some people live and function for years with some infarct, don't they?

A. Yes.

Q. For example, President Eisenhower, when he was President had a myocardial infarct, didn't he?

A. Yes.

Q. He recovered and is getting along and playing golf today and so it is not unusual to find it.

A. A person may recover from an infarct and live for many years.

* * * * *

[299] Q. Does it show the date and time of death?

A. Date of death, November 3rd, 1964, 9:30 a.m.

Q. In your file, in one of the documents referred to, is a so-called autopsy card, is it?

A. Yes.

Q. Would you just read what is clipped to the top, to the autopsy card, please.

A. "Copy of autopsy card not to be given out unless released by Corporation Council [sic]."

Q. Then I notice that a file folder that you have here has some written notations on the front. Read that.

A. "Autopsy report not to be given out without Corporation Council's [sic] authorization."

Q. Doctor, on the reverse side of the autopsy card is there not written the following, and I will hand it to you for closer examination, in printing, cause of death, "I. Coronary insufficiency, ASHD, natural death. II. Fracture, right hip."

A. Yes.

* * * * *

[302] Q. And it is still fractured right hip contributing to this, isn't it Doctor?

A. As you mentioned earlier this is not a perfect science. There is some art in it, and just in order to indicate that she had a severe injury, I wanted to show the fractured hip on the death certificate.

* * * * *

[303] JULIUS STICKELL

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Horowitz:

Q. State your name to the Court, and your occupation.

A. Julius A. Stickell. Foreman for the District Government with the tree division.

Q. Mr. Stickell, how long have you been with the District Government?

A. It will be seven years in November.

Q. How long have you been a foreman in the tree division?

A. Oh, approximately - Assistant Foreman, I have been for five years, and the Foreman for about five months.

Q. Were you Assistant Foreman in October of 1964?

A. Yes.

Q. For the District of Columbia. Mr. Stickell, have you brought with you records dealing with the removal of a tree on Massachusetts Avenue, Northwest, on October 16, 1964?

A. Yes, but they are in the rest room.

MR. HOROWITZ: May he get his records?

* * * * *

[304] Q. Mr. Stickell, are those the records?

A. Yes, these are the records.

Q. Do these records help you refresh you recollection as to the removal of a tree on October 24, 1964 in this area?

A. Yes, they do.

* * * * *

Q. Do you need the record, Mr. Stickell?

A. Yes they will help.

Q. Mr. Stickell, do you know, or from reading those records, how many trees you removed approximately on October 16, 1964? We are dealing with October 16, 1964; is that correct?

[305] A. Yes, this is the date.

Q. October 16th. How many trees did you remove on that date?

A. Fifty-one.

Q. Did you remove trees on Massachusetts Avenue on that date?

A. Yes.

Q. How many trees did you remove on Massachusetts Avenue?

A. I think it was four that day.

Q. What did you do when you removed this tree on the 3100 block of Massachusetts Avenue?

* * * * *

Q. Mr. Stickell, what did you do on the removal of this tree on October 16, 1964?

MR. MILLER: Which is this tree?

MR. HOROWITZ: The tree in front of 38th and Massachusetts Avenue.

* * * * *

[306] Q. Did you remove a tree from the front of 38th and Massachusetts Avenue, Northwest?

A. Yes.

Q. What did you do in the removal of that tree?

A. In the removal I just remember a certain tree being taken up. I remember the spot we took care of where the tree was taken up. We took the tree up. Tamped it, put dirt on it, hilled the dirt and retamped it again.

Q. Now, Mr. Stickell, go back. Tell me how you take a tree up.

A. Usually grub it out with a grubber. If it is a small tree grub it out with a grubbing hoe and use a shovel, and after we take the tree out, like I say, we tamp the hole and put it in and, put the dirt in, and hill the dirt.

Q. When you say tamp, what do you mean?

A. We have the hand tampers, they are tapped like this on the ground.

Q. What does this tend to do?

A. Pack the ground.

Q. And then what do you do?

A. We put dirt in there and hill it up.

Q. What do you mean by hill it up.

A. We mound the dirt over the hole approximately and inch and a half to two to three inches, depending on the size of the hole

[307] and retamp it again.

Q. Over the level of the ground?

A. Yes, allow it to settle.

Q. Excuse me?

A. Allow for the settlement.

Q. This is the purpose?

A. Yes.

Q. What is the settlement?

A. Following the tree removal your ground is not what it has been permanent, it has been, you know, by breaking the ground up the ground is soft and when the rain comes it settles down. By hilling it two to three inches when it settles it should be close or even a little bit above the level of the ground.

Q. You mean after the settling takes place?

A. Yes.

Q. Should this level it off?

A. It should bring it down to a level or even maybe a little above a level. Put plenty of dirt, you want to take care of the settlement.

* * * * *

[308] Q. Did you supervise the removal of the tree, this particular tree and these trees in the District of Columbia on Massachusetts Avenue on October 16, 1964?

A. Yes, 3810.

Q. Did you supervise putting in of the dirt, the tamping it down?

A. Yes.

Q. Did you supervise the hilling?

A. Yes.

* * * * *

CROSS EXAMINATION

[309] By Mr. Miller:

Q. May I see the notes you looked at Mr. Stickell?

A. Yes.

Q. In October, 1964, you were the assistant foreman.

Q. Who was the foreman?

A. Warner. He was off at the time. It was a Saturday and we were working overtime.

Q. This was on a Saturday?

A. Yes.

Q. The 16th of October?

A. Yes.

Q. You are sure of that?

A. Yes. It was on a Saturday when we did the work.

Q. How many men did you have working for you?

A. I think it was, counting myself, two more - three. I had four men working for me, five counting myself.

Q. Were they all working together or working separately and taking these trees down?

A. There was one operation right there. The tree was removed and the ground was made safe there.

Q. Would you say how many trees you removed on this particular day?

A. I think approximately 51 or 52, I am not sure.

Q. I think you said 51.

[310] A. Fifty-one.

Q. Is there any doubt in your mind about it?

A. Fifty-one.

Q. What tree number was this particular tree on Massachusetts Avenue?

A. We were taking these according to the work orders which gave a certain area to - a certain area.

Q. Was it the first tree, or the twenty-third tree?

A. I do not know.

Q. Fifty one trees you removed that whole day.

A. Yes.

Q. Did you work all day?

A. Yes.

Q. What hours?

A. We worked from 6:30 until 3:00.

Q. Six-thirty in the morning until three in the afternoon?

A. Yes.

Q. Somewhere along the line it came to your attention a woman had fallen in a hole from this tree and there was some problems, didn't it?

A. Yes, quite a while later.

Q. When was that?

A. I really - It was just brought up to me by the foreman.

Q. It was what?

A. Brought to me by my foreman just one time. This was

[311] roughly, I would say, maybe two and a half, three years later.

* * * * *

Q. Did you ever go out to the scene where this woman was injured in a hole on Massachusetts Avenue?

A. Yes, I did.

Q. When did you go out there?

A. Oh, approximately a month ago.

Q. Is that the first time you have been there since October, 1964?

A. Yes.

Q. And that same place had trees been taken out and replanted several times?

A. We trimmed trees through there. It is our regular maintenance.

Q. This particular spot, the trees have been planted, removed by the District and replanted on a number of occasions.

[312] A. That is true.

Q. Before and after 1964, haven't they?

A. I don't know, but I imagine they have.

Q. Now, when the tree was removed by the church here, October, 1964, you weren't paying any more attention to that tree than any of the 51 you worked on that day?

A. I would say I don't specifically remember the tree but I remember the spot in front of the church because of making it safe. The tree itself, I couldn't say what size it was. It was a small tree. Whether the stakes were gone - I remember working on a hole, the hole the tree came out of.

* * * * *

A. This was a special order that we had. I was ordered to take the crew out that morning and that is why it was a Saturday, special job, taking the small trees up.

Q. What were your normal days of work during the week at that time in October, 1964?

A. Trimming trees and removing trees, large trees, mainly.

Q. You didn't understand me. What were the days of the week that you worked for the District in October, 1964?

[313] A. Monday through Friday.

Q. And then the fact that this occurred on a Saturday was what made it unusual and caused you to remember it?

A. Yes, and we had work but one Saturday, that one Saturday.

Q. Was the Saturday crew different from the crew you had been working with the rest of the week?

A. With the exception of one man.

Q. One man. You worked with a certain regular crew Monday through Friday?

A. A couple of these fellows didn't come in and they put one extra man with me.

Q. Aside from that it was the same crew, Monday through Friday.

A. Yes.

Q. And then Saturday was a different crew, is that it?

A. No. Like I say, with the exception of the one man.

Q. But Saturday working was unusual for you and that crew, wasn't it?

A. That is true.

Q. Normally you worked Monday through Friday but you remember this because it was a Saturday.

A. Yes.

Q. Now, when you removed this tree you say you noticed it was near a church.

A. I remember it being in front of this church, yes.

Q. So then you had in your mind you should do something to be

[314] safe because it was near a church and people walked there.

A. We do this procedure any place.

Q. Just on this one. Never mind the usual procedure. It was near the church, I think you said you took particular precautions; is that right?

A. Same precaution we take anyplace. Make it safe indefinitely.

Q. Explain the answer before when you said being near a church you wanted to make it safe.

* * * * *

Q. At any rate, did you put up a barricade when you pulled up the tree?

A. No, it was one operation. Remove the tree and make it safe.

Q. Who was in charge of the barricade department?

A. This I couldn't tell you.

Q. Some other division of the District?

A. I don't know. You have seen barricades in the District, haven't you?

MR. HOROWITZ: He answered he doesn't know.

MR. MILLER: I asked now if he had seen barricades with the District name on it.

A. Yes.

By Mr. Miller:

Q. And you have seen also barricades which have lights that

[315] flick off and on?

A. Yes.

Q. That is part of the equipment of the District of Columbia?

A. Not in our division, we don't use them.

* * * * *

Q. Well, besides barricades or lights did you put up any other warning device at or near the place where the tree was removed?

A. No.

* * * * *

[316] Q. Mr. Stickell, in October, 1964, you were in the tree and landscaping division of the Department of Highways and Traffic, were you not?

A. Yes.

Q. The daily worksheet which you looked at to refresh your memory shows that on 10/16/64 there was 51 trees removed that you described.

A. Yes.

Q. And that same document, the daily worksheet dated 10/16/64 shows that on Massachusetts Avenue, Northwest, between 16th Street and 49th Street, four trees were removed, is that right?

A. That is what it shows on the record.

Q. Now, those were the four trees on Massachusetts Avenue which were included in the total of 51 trees that you and your crew removed that day?

A. Yes.

* * * * *

[319] Q. Did you ever go back and inspect this spot where you removed the tree?

A. No, I didn't.

Q. Was that somebody else's job?

A. Yes.

Q. Who?

A. Area manager.

Q. Of the District of Columbia?

A. District of Columbia.

* * * * *

THE COURT: Call your next witness.

MR. HOROWITZ: If your Honor will indulge me for a minute please. At this time the District of Columbia rests.

* * * * *

[326] THE COURT: The Court will reserve its ruling on the Motion for Directed Verdict made at the close of all the evidence. Gentlemen, do you have any requested instructions to submit at this time?

* * * * *

[337] THE COURT: All right. Anything further?

MR. HOROWITZ: No, Your Honor.

MR. MILLER: Since I have asked the Court to take judicial notice, I think I should tender the Xerox table, table showing the present worth.

THE COURT: Yes, that will be marked as an exhibit.

MR. MILLER: Nine, I think it was.

THE COURT: Whatever it was, the clerk has the sticker for it. You have him mark it and it is in evidence.

* * * * *

THE COURT: Ladies and gentlemen of the jury, it now becomes my duty to instruct you as to the law that applies in this case, and it is your duty as jurors to follow and apply the law as I shall state it to you.

* * * * *

[341] The statements of counsel are not evidence and should not be considered as evidence unless such statement or statements were made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such testimony is not evidence in this case and is to be completely disregarded. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as I may instruct you the law creates.

* * * * *

[345] In this case, the plaintiff Miss Fritz, seeks damages under both the survival statute and the wrongful death act of the District of Columbia for the injury and the accident of her mother which the plaintiff alleges were proximately caused by the defendant District of Columbia's negligence. The plaintiff claims that the defendant removed a tree from the grassy parking space between the curb and sidewalk near the entrance to the Church of the Annunciation at 3810 Massachusetts Avenue Northwest and in so doing negligently caused and permitted a hole or a hollow or depression to exist and remain unfilled, knowing full well that pedestrians may step therein off the curb

[346] to enter the street or church, the sidewalk near the church at this point. Plaintiff further claims that her mother fell in this hole or hollow while proceeding from plaintiff's automobile to the church, and that she sustained injuries and subsequently died as a result of this fall.

The defendant denies any negligence on its part and claims that the accident was proximately caused by decedent's own negligence or the decedent's contributory negligence. The defendant further claims that the decedent's death was due to independent causes and was not proximately caused by any injuries she may have sustained as a result of this fall.

The foregoing are only the claims of the parties and are not to be considered by you as evidence. Remember, as you have previously been instructed, that in order for plaintiff to recover on either or both of the actions she has brought, she must prove her claims under either or both of them by a preponderance of the evidence.

* * * * *

[349] The plaintiff, Elizabeth W. Fritz, brings this action under the [350] survival statute, as I previously mentioned. This is one aspect of her cause of action, as the legal representative of the deceased individual in whose favor a cause of action has accrued prior

to death. If you find for the plaintiff you shall take into consideration in arriving at your verdict the pecuniary loss suffered by the deceased as a result of the injuries sustained in this case, which includes the value of reasonable and necessary medical and hospital services. You shall also make an award of reasonable compensation for the decedent's disability between the time of the accident and the date of death, which disability was directly caused by the defendant's actions. However, in considering this latter element of damages, you are instructed that there can be no recovery for pain and suffering. In addition, the plaintiff is entitled to recover decedent's probable future earnings during her life expectancy discounted to present worth. You should first ascertain in determining future earnings, decedent's gross possible income and in this connection you should consider the decedent's age, health, occupation, work background, if any, and any other factor concerning the decedent that might with reasonable certainty be a guidepost for you to follow in determining this figure. From this figure you should subtract the cost of decedent's personal maintenance and whatever taxes is reasonably certain she would be required to pay. After this has been completed, you have arrived at a net probable earning and
[351] this may be considered by you as the amount of probable future earnings. You must next discount this amount to present worth

and by this is meant that you must decide what sum of money invested properly will annually return an amount of money equal to the yearly loss of decedent's probable future earnings.

The plaintiff, Elizabeth W. Fritz, brings this other aspect of her other action under the wrongful death act, as the personal representative of her deceased mother. The person that she actually represents is herself, who is the real party, and she is the real party in interest in this action and she is the real plaintiff. If your verdict is for the plaintiff it should be in such sum as under all the circumstances of the case may be fair and reasonably compensate for the pecuniary loss sustained by her by reason of the death of her deceased mother. The law does not permit you to and you must not award her any sum for the sorrows, mental distress or grief that she may have suffered by reason of the death of her mother, nor for any pain or suffering or pecuniary loss that the deceased sustained prior to her death as a result of the injury. The law does not compensate for grief for mental suffering or for mental anguish caused by the death of the member of one's family. The law is that damages for death must be limited to damages of a pecuniary nature. That is, to the financial or monetary loss sustained as a result of the death.

In assessing this amount you may, insofar as the same are shown
[352] by the evidence, consider the expectancy of life, the health and earning capacity of the plaintiff, the deceased, also the station in life of the parties and all other facts in evidence that throw light upon the fact of the pecuniary loss, including the amount of the actual expense, that is the medical and hospital bills and funeral expenses incurred.

According to the Health, Education and Welfare table of mortality the expectancy of life of one age 78 years is 8 years. This fact of which the Court has taken judicial notice is now in evidence to be considered by you in fixing damages, if you find that the plaintiff is entitled to a verdict. However, this one factor of evidence is not by law controlling but should be considered in connection with all the other evidence bearing on the same issues such as that pertaining to the health, habits and activity of the person whose life expectancy is in question.

I would caution you not to permit yourselves to be influenced by anything I have said or done which you might think suggested to you that I am inclined to favor the claims or position of either party. I have not intended to express or to intimate any opinion as to what witnesses are worthy of belief or disbelief, what facts are established, which facts have not been established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate

an opinion relating to any of these matter [sic] I instruct you to disregard that seeming indication.

[353] Finally, I would instruct you that when you retire to the jury room to deliberate on your verdict, you shall select one of your members as foreman who will be your spokesman in Court. I would also instruct you that your verdict must be unanimous. In other words, all twelve of you must agree on the same verdict.

Will you gentlemen come to the bench.

(Out of the hearing of the jury, the following proceedings were had:)

THE COURT: Counsel are now given an opportunity to object to the Court's instructions, Mr. Miller?

MR. MILLER: Well, I would object to the defendant's number 5 - 3, to which I previously stated the reason in chambers. Without restating it again.

THE COURT: Number 3?

MR. MILLER: I would also call Your Honor's attention - Well, is that the one about being on the guard?

THE COURT: Yes.

MR. MILLER: That is covered. In the survival statute, included that section dealing with the future earnings. There isn't any proof of earning in that sense. Now, there is the --

THE COURT: I might say I took the fact that the pension is to be commensurate with earnings.

MR. MILLER: I wanted to be sure.

THE COURT: They are able to consider that as earnings.

[354] MR. MILLER: There is the other one, the standard one Your Honor gave on wrongful death. Your Honor instructed among other things that the specials, including medical and hospital and funeral. I think that Hudson vs. Lazarus and other cases point out we shouldn't be asking for double recovery so therefore since the survival is hospital and medical I think the jury should be told if they find for the plaintiff on both the hospital and medical would be only one. I would prefer it under the survival only but at any rate, hospital and medical not twice because I believe this protection --

THE COURT: Right.

* * * * *

MR. MILLER: * * * *

[355] I object to the instruction setting forth the measure of damages in the event they recover under the survival statute for the reason, among others, that it limits the time to the period between the date of the accident or injury and the date of death. I believe the instruction itself in the form it appears in the stock book is defective in

that regard because it purports to cite - to be based upon Hudson vs. Lazarus whereas in fact, Husdon vs. Lazarus was reversed, an insuffi-

cient verdict below, saying in addition to the amount of earnings

[356] and medical expense in the two-year period that the decedent

survived, that in addition thereto that the plaintiff's personal representative was entitled to recover among other things, for the probable future earnings, such probable future earnings covering the span of time beyond the date of death. That the Court also held that in addition thereto the plaintiff was entitled to recover for disability. That such disability in my opinion should also extend to the period of life expectancy for the reason that the exact loss of future earnings going beyond that is merely the economic translation of disability. That therefore what the Court is doing is allowing the future earnings as the economic reflection and also saying the jury should give for disability. It did not limit the case to the period between injury and death and that by reason of point three, life expectancy, that the disability also should be that which would be found by the jury to extend and endure for the period of - in case of the permanency, for the life expectancy. I don't have the numbers but the last objection I have relates to a final series of what I think the instruction --

THE COURT: Autopsy?

MR. MILLER: Sets forth the statute on autopsy, and our theory that it was unauthorized under the statute and that accordingly the tort feasor which committed the second tort should not be entitled to the use of it thus obtained. I think I explained that before.

* * * * *

[357] MR. HOROWITZ: * * * *

I object to your not using the instructions submitted by the District of Columbia in regard to contributory negligence, the ones we submitted. I object to the instruction under the survival act of anything dealing with future earnings as these were not future earnings as intended by the statute. As Mr. Miller mentioned before, stated, that under the survival act and under the wrongful death act they overlap one another and both state something about medical --

THE COURT: I propose to further advise they jury that in the event they find for the plaintiff that they may not find - her medical and hospital bills under both acts.

[358] MR. MILLER: One but not the other.

THE COURT: Right. They may find it under one but not the other.

MR. MILLER: For the medical and hospital.

THE COURT: Right. Is that all?

MR. HOROWITZ: Yes.

THE COURT: Gentlemen, about this form of verdict. I don't know whether the jury will come in - assuming they find for the plaintiff is it going to be one figure?

MR. MILLER: I think it is two figures.

THE COURT: You have a double-barreled proposition.

MR. MILLER: I think there is two forms of verdict. If you find for the plaintiff under the survival act and under the wrongful death act. It looks to me like it is two verdicts.

MR. HOROWITZ: Or verdict for the defendant.

THE COURT: It is four. They could find for the plaintiff on the survival act and not on the wrongful death act.

MR. HOROWITZ: I think they should be instructed on that.

THE COURT: Maybe we can wait and see what they do on that question. Maybe they will resolve it for us.

(In the hearing of the jury, the following proceedings were had:)

THE COURT: Members of the jury, I would instruct you further

[359] pertaining to the claim of the plaintiff under the survival statute as well as under the wrongful death act. You will recall that I indicated that if you found a verdict for the plaintiff that among other

items you could consider would be the medical and hospital bills. If you would find under either act you cannot find the same items under both. In other words, you can't find for the medical and hospital bills twice.

* * * * *

MR. HOROWITZ: Before the jury goes, may we approach the bench?

THE COURT: Yes.

(Out of the hearing of the jury the following proceedings were had:)

* * * * *

[361] THE COURT: I can go one step further and I can set out suggested forms of the verdict and then this is the procedure we use all the time. I understand you don't do it down here. We, the jury, find for the blank, plaintiff or defendant, on the claim under the survival act. We, the jury - it would really be four forms of verdict. We, the jury, find for the plaintiff on the claim of the survival act and assess damages at blank dollars or we find for the defendant under the survival act. Then we find --

MR. HOROWITZ: I would agree with that one.

THE COURT: Would this be agreeable with you, and then have the marshal submit this to the jury typed up as to their forms of verdict?

MR. HOROWITZ: Yes.

[362] MR. MILLER: Fine.

THE COURT: I will do it and have it prepared and without further consultation with counsel, submit it to the jury, or would you like to come in and look at it?

MR. MILLER: I would just as soon we agree on it and have it sent to the jury.

MR. HOROWITZ: I agree. I think Your Honor knows best. I think it is the best.

(In the hearing of the jury, the following proceedings were had:)

THE COURT: Mr. Marshall, you may conduct the jury to their lunch.

(Whereupon, at 12:50 p.m., the jury retired to deliberate upon their verdict.)

(During the deliberation of the jury the following proceedings were had:)

THE COURT: The Court having received a note from the jury at 2:40 p.m., counsel for the parties being present in the Court's chambers, the note requests the following, "Please bring in the following: Mortality rate sheet, hospital records, death certificate and receipts of money paid." Signed by Lydia H. Bunch. These are the exhibits,

gentlemen, and unless there is some objection, the Court would direct the clerk to deliver them to the marshal to deliver them to the jury.

MR. MILLER: We have no objection but there is one set of

[363] documents which I believe are the hospital records which does have a statement about insurance and I would like to have that blotted out so there is nothing about insurance.

THE COURT: Do you have any objection to that?

MR. HOROWITZ: No.

* * * * *

THE COURT: Mr. Clerk, you have a form of verdict there that has been shown to the Court and I understand it has been approved by you gentlemen; is that correct?

MR. MILLER: That is correct.

MR. HOROWITZ: Yes.

THE COURT: You may deliver it to the jury, Mr. Marshal, along with the exhibits. And unless there is something further now gentlemen, we will adjourn this session.

(During the deliberation of the jury the following proceedings were had:)

THE COURT: Let the record show that counsel for the parties met in the Court's chambers pursuant to the receipt of another note at 3:30 p.m. Gentlemen, the note is as follows: "Your Honor, does the

[364] life expectancy come under the survival act or the wrongful death act?" Do you have any suggestions as to the answer to that question and what to do about it?

MR. MILLER: I suppose undoubtedly it comes under the death act. Query as to whether it comes under the survival act under my theory which I urged Your Honor unsuccessfully, it would - because of the disability for x number of years, but I believe the way that Your Honor has ruled, in other words, the interval on disability up to date of death. I suppose --

MR. HOROWITZ: I believe it comes under the wrongful death act and not under the survival act.

MR. MILLER: You have another question under Hudson vs. Lazarus whether the pension which would stand instead of wage earning capacity, that did in Hudson vs. Lazarus also bear upon it. In fact, I think the instruction for that reason mentions life expectancy.

THE COURT: In addition, plaintiff is entitled to recover decedent's probable future earnings during the life expectancy discounted at present worth. This is under the survival statute.

MR. MILLER: That is right.

MR. HOROWITZ: Your Honor, we would --

THE COURT: This is what I instructed. It seemed to me it applied to both.

MR. MILLER: That is right.

MR. HOROWITZ: No, Your Honor. I don't believe that is the [365] case. I did make an objection to your mentioning the life - well, the earning expectancy of this particular woman if she had no actual earning capacity. I think what they are talking about under the survival act and especially under Hudson vs. Lazarus, is three particular things. Number one, his medical and hospital expenses. Number two, his disability, and number three, would be a loss of earnings discounted to present worth. Now, I think that it would come down to - that loss of earning discounted to present worth as I understand it, is loss of earnings discounted to present worth during the time she would live. If we are going to use both statutes, Your Honor. Now, since there are two statutes and since they were sued under both statutes, then we will have to go under the wrongful death statute and see what the next of kin would be entitled to under the wrongful death statute because she can't be entitled to both. In other words, this would be just like medical expenses under survival and medical expenses under wrongful death.

THE COURT: Would that be fair to answer the question in that fashion, that it would apply to both but there may not be a double allowance for earnings.

MR. MILLER: Yes. It is certainly true there would not be a double allowance under death. Of course, it is the pecuniary loss to the next of kin for the period of life expectancy. That wouldn't be at all applicable though to the --

THE COURT: Pecuniary loss for the life expectancy under the

[366] wrongful death statute, isn't that the pecuniary loss determined by the life expectancy?

MR. HOROWITZ: Pecuniary loss under the wrongful death act is determined by the life expectancy. Now, under the survival act they say loss of earnings and they discuss loss of earnings. I question what lost of earnings are.

MR. MILLER: Pension or retirement income or social security payments are all earnings.

THE COURT: I would consider pension as earnings. This is my understanding.

MR. MILLER: There is a very good annotation on it at 81 A.L.R. 2d, 1939.

THE COURT: Would there be any objection to sending an answer to this question that the life expectancy is applicable to both acts but there cannot be a double recovery for loss of probable future earnings.

MR. HOROWITZ: I say no.

MR. MILLER: Your Honor, I think I am going to get a verdict. I certainly don't know whether I am or not. I don't want any error in it. I think the cleanest way would be for the mortality table and life expectancy to apply to wrongful death as they undoubtedly do. I am somewhat fearful of having them apply also to survival under the theory that the jury has been instructed on and I wouldn't want to confuse the jury with trying to figure out what is double recovery. I am inclined to think for my part, my associate confirms, I would like to

[367] have the answer indicate the life expectancy would be applicable to the wrongful death.

MR. HOROWITZ: I will agree with that, Your Honor.

THE COURT: Well, I certainly am not in search of errors either. I hope we haven't - that you haven't laid any traps for me.

MR. MILLER: We haven't.

MR. HOROWITZ: I believe Mr. Miller is trying to keep you out of a trap this time.

THE COURT: It would appear that is true. All right, then in response to this, would this be agreeable then. In response to your inquiry the life expectancy applies only to the wrongful death action. Then have the marshal take that answer in without calling them back into the courtroom.

MR. HOROWITZ: Yes.

MR. MILLER: Agreed.

THE COURT: That is all, then.

(Whereupon, at 3:55 p.m., March 29, 1968, the jury returned in the courtroom with a verdict.)

THE CLERK: Will the forelady please rise? Madam forelady, has the jury agreed upon a verdict?

FORELADY: We have.

THE CLERK: Is this the verdict of the jury?

FORELADY: Yes, it is.

[368] THE CLERK: Members of the jury, your verdict is as follows:

"We, the jury, find for the plaintiff, Elizabeth W. Fritz, administratrix for the estate of Elizabeth M. Fritz, against the defendant District of Columbia, under the survival statute, in an amount of $5,000.00." "We, the jury, find for the plaintiff, Elizabeth W. Fritz, administratrix of the estate of Elizabeth M. Fritz against the defendant

District of Columbia under the wrongful death statute, in an amount of $15,000.00." It is signed by the forelady, Lydia H. Bunch, and is dated March 29, 1968. Members of the jury, is that your verdict so say you each and all?

(Response of yes.)

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 22,029

DISTRICT OF COLUMBIA,

Appellant,

v.

ELIZABETH W. FRITZ,
Administratrix, c.t.a., of the
Estate of Elizabeth M. Fritz,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

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ISSUES PRESENTED FOR REVIEW

1. Whether the record supports the conclusion that the District of Columbia either created a dangerous condition or negligently permitted a dangerous condition to exist on public space.

2. Whether the damages assessed under the "Wrongful Death Act" and under the "Survival Act" are excessive and unsupported by the record.

3. Whether a present worth table (exhibit numbered 9) is admissible in evidence when it has not been authenticated and properly explained to the jury by a competent witness.

4. Whether the trial court charged the jury correctly with respect to the law on damages under the "Wrongful Death Act" and under the "Survival Act."

This case has not been before the Court on any prior occasion.

I N D E X

Page

SUBJECT INDEX

Issues Presented for Review..... i

Statement of the Case..... 1

The Pleadings..... 1

The Evidence..... 3

Argument

I The record is devoid of any evidence that the District of Columbia either created or had notice of the condition which caused the accident..... 10

II The damages assessed under both the "Wrongful Death Act" and the "Survival Act" are excessive and unsupported by the record.. 12

III The court below erred in admitting into evidence and in permitting the jury to consider, without the benefit of explanatory testimony, exhibit numbered 9..... 24

IV The trial court's instructions on damages were erroneous, confusing, and misleading to the jury..... 27

Conclusion..... 29

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72 Cal. App. 2d 821,
165 P. 2d 695..... 24-25

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Hospital (D. D. C., 1952),
102 F. Supp. 792,
aff'd. National Homeopathic
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269 F. 2d 578..... 25

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 22,029

DISTRICT OF COLUMBIA,

Appellant,

v.

ELIZABETH W. FRITZ,
Administratrix, c.t.a., of the
Estate of Elizabeth M. Fritz,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

STATEMENT OF THE CASE

The Pleadings

Elizabeth W. Fritz, Administratrix of the Estate of Elizabeth M. Fritz, brought suit against the District of Columbia under the "Wrongful Death Act"[1] and under the "Survival Act"[2] for damages

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[1] Act of December 23, 1963, 77 Stat. 596, Section 16-2701, D. C. Code, 1967.

[2] Act of December 23, 1963, 77 Stat. 509, Section 12-101, D. C. Code, 1967.

sustained as the result of a fall by her mother, Elizabeth M. Fritz, on public space (A. 3). It is alleged in the complaint that the District of Columbia "* * * removed a tree near the curb, at or near the entrance to the Church of the Annunciation, on the south side of 3810 Massachusetts Avenue, N. W., Washington, D. C., without replacing it, and negligently caused and permitted a hole, hollow or depression to exist and remain unfilled where it had removed said tree; and through its agents, servants and employees negligently caused and permitted a dangerous condition to exist for a long time; negligently failed to erect a barricade or lights, and negligently omitted to fill or cover said hole or hollow and failed to have adequate lighting thereat, knowing full well that pedestrians may step therein off the curb to enter the street or church at this point" (A. 4). It is further alleged that, on October 24, 1964, the mother, upon alighting from an automobile near the entrance to the church, fell in the hole or hollow and sustained "* * * mortal injuries which resulted in her death on November 3, 1964" (A. 4).

Following a trial by jury, judgment in the amount of $5,000 under the "Survival Act" and in an additional amount of $15,000 under the "Wrongful Death Act" was entered against the District of Columbia in accordance with the jury verdict (A. 142-143). A timely motion for judgment non obstante veredicto or, in the alternative, for a new

trial was denied by the court on April 10, 1968, and this appeal followed on May 9, 1968 (A. 2-3).

The Evidence

The evidence at trial was that the depression in which the mother fell was located in the space between the curb and sidewalk near the entrance to her church (A. 14, 22-24). The accident occurred around 7:30 p.m. on October 24, 1964 (A. 19-20). The records of the Tree and Landscaping Division of the District of Columbia Government disclosed that the District removed a tree from the area on October 16, 1964 (A. 92-93, 112-114). The foreman in charge testified that, upon removal of the tree, dirt was placed in the hole and tamped, and a small mound of dirt, from 1 to 3 inches, was placed over the hole to allow for settlement (A. 113-115). Although none of the witnesses observed the depression prior to the accident (A. 16, 72-73, 78-79, 84), the estimates of its size by the various witnesses who observed it following the accident ranged from 6 to 9 inches in depth and from 1 1/2 to 2 feet in diameter (A. 15, 25, 76, 83).

Shortly after the fall, the daughter drove her mother to Casualty Hospital, where it was determined that she had sustained a fractured hip (A. 30). Surgery was performed on October 26, 1964, and the mother died on November 3, 1964 (A. 41).

The mother was born on April 27, 1886, and was 78 1/2 years of age at the time of her death (A. 17-18). According to the life table published by the United States Department of Health, Education, and Welfare, the average female 78 years of age would have a life expectancy of 8 years (A. 64). Although the mother's physician characterized her general condition prior to the accident as being average "for a person her age," he had been treating her for a diabetic condition for approximately 15 years (A. 41), and had hospitalized her for a month in May of 1964 following a coronary heart attack (A. 42). He stated that her diabetic condition was stable (A. 41), and that she had made a complete recovery from the heart attack (A. 43). Later, in response to a question of what he found as a result of an examination of the mother 10 days to 2 weeks prior to the accident, he stated:

> "All those previous times before she got injured she was, as far as I was concerned, she was doing very well. Certainly her condition wasn't good. She was an old lady and had arteriosclerotic heart difficulties and coronary and diabetes. Certainly the condition wasn't good. She was quite active, moved around, did things that anybody else her age could do." (A. 49-50.)

A post-mortem examination of the mother revealed that a few months prior to the accident she had sustained a stroke (A. 104-105), and that an examination of the heart showed that there was severe

coronary arteriosclerosis " * * * with total occlusion of the anterior descending branch of the distal half of the right coronary artery. * * * " (A. 106.) The doctor testified that "[d]iabetes has a bad effect on arteriosclerosis in that the arteriosclerosis is more severe and progresses more rapidly" (A. 107).

The daughter, who is the only surviving child, is unmarried and employed as a school teacher earning between $5,000 and $6,000 a year (A. 17, 39, 65-66). She was 52 years of age at the time of her mother's death, and had a life expectancy of 26.8 years (A. 18, 64). The daughter and her mother lived together in the mother's home (A. 39). The mother received a government annuity in the amount of $207.50 per month -- her deceased husband having worked for the government for a number of years (A. 37). From this amount, the daughter stated that the mother made the payments on the house in the amount of $100 per month, paid the heat bill which amounted to $20 per month, paid the remaining utilities which amounted to $20 per month; paid her own doctor bills, the amount of which was unspecified, and purchased and took care of her own clothes (A. 37-38, 68-69). The mother would spend $15 per month on the daughter on trips (A. 38-39), and would occasionally surprise her with a "present" (A. 39).

The daughter paid for all the food which amounted to $40 per month, paid for all the prescriptions and drugs which amounted to $50 per month, paid $36 per month for household help, and paid for the laundry, the amount of which was unspecified (A. 67-69). The daughter stated that her mother took care of the beds, did the dishes, helped with the housework, and "did little things around the yard" (A. 31).

The expenses resulting from the accident were: medical bills - $400; hospital bills - $605.85; funeral bill - $1,145; and probate expenses - $26.56 (A. 62-63).

The court, over the objection of the District of Columbia, admitted into evidence exhibit numbered 9, a table from an Internal Revenue Bulletin (A. 10, 100-103). The only explanation of this table, other than that provided by counsel for plaintiff (who was not under oath), appears at the beginning of the table and is as follows:

> "Table showing the present worth at 3 1/2 percent of an annuity for a term certain, of an income interest for a term certain, and of a remainder interest postponed for a term certain." (A. 10.)

The following instructions were given the jury respecting the elements of damages under the "Survival Act":

> "* * * If you find for the plaintiff you shall take into consideration in arriving at your verdict the pecuniary loss suffered by the deceased

as a result of the injuries sustained in this case, which includes the value of reasonable and necessary medical and hospital services. You shall also make an award of reasonable compensation for the decedent's disability between the time of the accident and the date of death, which disability was directly caused by the defendant's actions. However, in considering this latter element of damages, you are instructed that there can be no recovery for pain and suffering. In addition, the plaintiff is entitled to recover decedent's probable future earnings during her life expectancy discounted to present worth. You should first ascertain in determining future earnings, decedent's gross possible income and in this connection you should consider the decedent's age, health, occupation, work background, if any, and any other factor concerning the decedent that might with reasonable certainty be a guidepost for you to follow in determining this figure. From this figure you should subtract the cost of decedent's personal maintenance and whatever taxes is reasonably certain she would be required to pay. After this has been completed, you have arrived at a net probable earning and this may be considered by you as the amount of probable future earnings. You must next discount this amount to present worth and by this is meant that you must decide what sum of money invested properly will annually return an amount of money equal to the yearly loss of the decedent's probable future earnings." (A. 127-128.)

With respect to the elements of damages under the "Wrongful Death Act," the court instructed the jury that:

> "The plaintiff, Elizabeth W. Fritz, brings this other aspect of her action under the wrongful death act, as the personal representative of

her deceased mother. The person that she actually represents is herself, who is the real party, and she is the real party in interest in this action and she is the real plaintiff. If your verdict is for the plaintiff it should be in such sum as under all the circumstances of the case may be fair and reasonably compensate for the pecuniary loss sustained by her by reason of the death of her deceased mother. The law does not permit you to and you must not award her any sum for the sorrows, mental distress or grief that she may have suffered by reason of the death of her mother, nor for any pain or suffering or pecuniary loss that the deceased sustained prior to her death as a result of the injury. The law does not compensate for grief for mental suffering or for mental anguish caused by the death of the member of one's family. The law is that damages for death must be limited to damages of a pecuniary nature. That is, to the financial or monetary loss sustained as a result of the death.

"In assessing this amount you may, insofar as the same are shown by the evidence, consider the expectancy of life, the health and earning capacity of the plaintiff, the deceased, also the station in life of the parties and all other facts in evidence that throw light upon the fact of the pecuniary loss, including the amount of the actual expense, that is the medical and hospital bills and funeral expenses incurred.

"According to the Health, Education, and Welfare table of mortality the expectancy of life of one age 78 years is 8 years. This fact of which the Court has taken judicial notice is now in evidence to be considered by you in fixing damages, if you find that the plaintiff is entitled to a verdict. However, this one factor

> of evidence is not by law controlling but should be considered in connection with all the other evidence bearing on the same issues such as that pertaining to the health, habits and activity of the person whose life expectancy is in question." (A. 128-129.)

At the suggestion of counsel, the court instructed the jury further as follows:

> "Members of the jury, I would instruct you further pertaining to the claim of the plaintiff under the survival statute as well as under the wrongful death act. You will recall that I indicated that if you found a verdict for the plaintiff that among other items you could consider would be the medical and hospital bills. If you find under either act you cannot find the same items under both. In other words, you can't find for the medical and hospital bills twice." (A. 134-135.)

After the jury had been deliberating for some period of time, it sent a note to the court inquiring:

> "Your Honor, does the life expectancy come under the survival act or the wrongful death act?" (A. 137-138.)

With the consent of both parties, the court answered:

> "* * * In response to your inquiry the life expectancy applies only to the wrongful death action. * * * " (A. 142.)

ARGUMENT

I

The record is devoid of any evidence that the District of Columbia either created or had notice of the condition which caused the accident.

The negligence alleged in the complaint is that the District of Columbia "* * * removed a tree near the curb, at or near the entrance to the Church of the Annunciation, on the south side of 3810 Massachusetts Avenue, N. W., Washington, D. C., without replacing it, and negligently caused and permitted a hole, hollow or depression to exist and remain unfilled where it had removed said tree; and through its agents, servants and employees negligently caused and permitted a dangerous condition to exist for a long time; negligently failed to erect a barricade or lights, and negligently omitted to fill or cover said hole or hollow and failed to have adequate lighting thereat, knowing full well that pedestrians may step off the curb to enter the street or church at this point." (A. 4.)

The above, reduced to its essentials, is an allegation that the District of Columbia (1) created a dangerous condition, and/or (2) negligently failed to correct a dangerous condition existing on public space. The remainder merely describes the manner in which the District allegedly created or failed to correct a dangerous condition.

As to the allegation that the District of Columbia created the dangerous condition, the daughter merely proved that the District removed a tree from the area on October 16, 1964, and that on October 24, 1964, there existed a hole or hollow estimated to be from 6 to 9 inches deep and from 1 1/2 to 2 feet wide. There was no affirmative testimony that the District failed to properly fill the hole created by the removal of the tree. On the contrary, the testimony of the individual supervising the removal of the tree was that dirt was placed in the hole and tamped, and a small mound of dirt, from 1 to 3 inches, was placed over the hole to allow for settlement. (A. 113-115.) Such being the state of the record, it hardly supports any conclusion that the District created a dangerous condition.

As to the allegation that the District of Columbia negligently failed to correct a dangerous condition, it was incumbent upon the daughter to prove, among other things, that the District had notice, either actual or constructive, of the dangerous condition. District of Columbia v. Woodbury, 136 U. S. 450, 463-464 (1890). Not one scintilla of evidence was presented in this regard, however. Each witness who testified as to the existence of the hole or hollow stated that he observed it for the first time after the fall (A. 16, 72-73, 78-79, 84). Consequently, the daughter did not prove her allegation that

the District negligently failed to correct a dangerous condition existing on public space.

II

The damages assessed under both the "Wrongful Death Act" and the "Survival Act" are excessive and unsupported by the record.

Under a most liberal construction of the evidence with respect to damages under the "Wrongful Death Act," the daughter, as the surviving next of kin, was awarded a much larger sum than she could possibly have received from her mother had her mother live the entire 8 years of the average life expectancy of a person her age. Likewise, the daughter, as legal representative of the estate, was awarded a much larger sum under the "Survival Act" than the decedent would have been entitled to receive had she lived to prosecute the action.

The "Wrongful Death Act," Section 16-2701, D. C. Code, 1967, creates a cause of action in favor of the surviving spouse and the next of kin against the person responsible for the wrongful death of the decedent.[3] The Act provides, in pertinent part, that:

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[3] "At common law there was no right of action for wrongfully causing the death of another. * * * The right of action exists in the District of Columbia by virtue of our statute * * * ." Jones v. Pledger, 124 U. S. App. D. C. 254, 256, 363 F. 2d 986 (1966).

> "The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. * * * "

In a wrongful death action in the District of Columbia, the plaintiff is entitled, in addition to the "reasonable expenses of last illness and burial" specifically provided by the Act, to the present value of those sums of money or services which he reasonably could have been expected to receive from the decedent had the decedent lived. Rankin v. Shayne Brothers, Inc., 98 U. S. App. D. C. 214, 234 F. 2d 35 (1956); Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (D. D. C., 1952), aff'd. National Homeopathic Hospital v. Hord, 92 U. S. App. D. C. 204, 204 F. 2d 397 (1953); Coleman v. Moore, 108 F. Supp. 425 (D. D. C., 1952); Ramsey v. Ross, 66 App. D. C. 186, 85 F. 2d 685 (1936).

The "Survival Act," Section 12-101, D. C. Code, 1967, provides:

> "On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased. In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom."

The Act was construed in Hudson v. Lazarus, 95 U. S. App. D. C. 16, 217 F. 2d 344 (1954), to mean that, upon a finding of liability, the estate, acting through its legal representative, is entitled, in addition to the "pecuniary loss"[4] suffered by the decedent in his lifetime, to (1) the value of all reasonably necessary medical and hospital services obtained from a collateral source, (2) an allowance for the decedent's "disabilities" caused by the accident, and (3) the decedent's probable future earnings during his life expectancy, discounted to present worth.

Although the wrongful death of a person may give rise to a cause of action under both the "Wrongful Death Act" and the "Survival Act," Sornborger v. District Dental Laboratory, Inc., 105 U. S. App. D. C. 290, 266 F. 2d 694 (1959), it is readily apparent that the elements of damages allowable under each are such that there may be a duplication in an award. The Court noted in Sornborger that "[d]ifficulties may of course arise in the assessment of damages" when an action is brought under both Acts; and in Hudson v. Lazarus, supra, the Court cautioned

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4 Counsel stipulated that the "pecuniary loss" suffered in that case included loss of pay from date of accident until death, hospital bills and medical supplies for which the decedent was liable, transportation charges to and from the hospital, and an allowance for ruined clothing.

that "[d]ouble recovery for the same elements of damage should of course be avoided."

The total amount of out-of-pocket expenses claimed for the alleged wrongful death of decedent is $2,177.81, which consists of $1,005.85 for medical and hospital bills, $1,145 for the funeral bill, and $26.56 for probate expenses (A. 62-63). In view of the trial court's instructions with respect to the treatment of the medical and hospital bills, it is not possible to determine whether the jury included them in the $5,000 award under the "Survival Act" or in the $15,000 award under the "Wrongful Death Act" (A. 134-135). Assuming, however, in order that there may be a basis for at least a portion of the award under the "Survival Act," that the $1,005.85 for medical and hospital bills is included in the $5,000 award under the "Survival Act," then, under the law as it exists in the District of Columbia, the $15,000 award under the "Wrongful Death Act" consists of $1,171.56 for funeral and probate expenses and $13,828.44 ($15,000 less $1,171.56) for the present value of the amount of money which the daughter could reasonable have expected from her mother had the mother lived.

The record fall far short of supporting an award which even approximates the $13,828.44 allowed for the present value of the amount

of money which the daughter could reasonably have expected from the mother had the mother lived. Unlike most cases of this nature, the economic value of the decedent's life can be ascertained with a relatively high degree of certainty. The mother's income consisted solely of a government pension in the amount of $207.50 per month. This amount was fixed for the duration of her life and would not change in any respect, except perhaps for some minor adjustments upwards to compensate for increases in the cost of living. However, due to the nature of such adjustments, they could not possibly result in any increased net benefits to either the mother or the daughter.

In determining whether there is any reasonable likelihood that the daughter would have derived any economic benefit from her mother's income had the mother lived, the facts must be weighed "* * * in the light of the situation existing as of the date of the death * * *." Coleman v. Moore, 108 F. Supp. 425, 427 (D. D. C., 1952).

On the date of the mother's death, the two were living together in the mother's house sharing expenses.[5] Although the mother assumed responsibility for the house payments ($100 per month), utility bills

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[5] The ownership of the house went to the daughter upon the mother's death (A. 66).

($40 per month), and spent $15 per month on the daughter on trips (A. 37-38, 68-69), it is clear that the daughter received no net benefit in those amounts. In return for the mother's expenditure of $155 ($100 plus $40 plus $15) which directly benefited the daughter, the daughter testified that she paid for all the prescriptions and drugs in the amount of $50 per month,[6] paid all the food bills which approximated $40 per month, paid $36 per month for the household help, and paid an unspecified amount for the laundry (A. 67-69). Obviously the expenditure of a minimum of $70 of these amounts ($50 for prescriptions and drugs and $20 for one half the food bill), which were for the mother's benefit, has been obviated by the mother's death.[7] Therefore, even though the mother's life resulted in a gross benefit of $155 per month to the

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[6] Although the daughter testified that the prescriptions and drugs for her and her mother amounted to $50 per month, there was no testimony that the daughter was under a doctor's care or taking any medication whatsoever. On the other hand, the mother was examined by her doctor every two weeks and was taking various drugs and medicines for a diabetic and heart condition. Consequently, it is reasonable to infer from the testimony that most, if not all, of the $50 was for the sole benefit of the mother.

[7] It can be readily seen that the sum of $70 in reality is much too low in that it does not include any part of the mother's laundry bill that the daughter was paying (A. 68-69), and makes no allowance for transportation, gifts, and other expenditures which the daughter had during the mother's lifetime but does not now have.

daughter, such sum must be offset by a minimum of $70 per month. Consequently, the $85 net gain to the daughter ($155 less $70), allowing the maximum 8 years of life expectancy and using her own present worth table, has a present worth of $7,011.48 (12 times $85 times 6.8740). Such amount is substantially below the $13,828.44 found by the jury to be the present worth of the sum which the daughter could reasonably have expected to receive from her mother had her mother lived. The jury, without any justification whatsoever, apparently used a figure somewhat in excess of the $155 figure because a monthly income of $155, again using the maximum life expectancy and the daughter's present worth chart, would have a present value of $12,785.64 (12 times $155 times 6.8740).[8]

The figure used by the jury was much larger than that claimed by the daughter in the pretrial order. There, it was said that "[T]he decedent left no dependents but it is claimed that $110.00 of her income

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[8] If the jury included the $1,005.85 bill for medical and hospital services in the award under the "Wrongful Death Act" rather than under the "Survival Act" as it was permitted to do under the court's instruction, the figure of $12,785.64 would come within $36.55 of the amount allowed by the jury as the present value of the amount which the daughter could reasonably have expected from her mother had she lived ($15,000 award less $2,177.81 total out-of-pocket equals $12,822.19).

was contributed to her daughter monthly for approximately five years prior to death of decedent." Such amount, again using the daughter's tables, would have a present worth of $9,073.68 (12 times $110 times 6.8740), which would be $4,754.76 less than the amount actually awarded.

As stated previously, an allowance of a net gain to the daughter of $85 per month over a period of 8 years results in a greater sum than the record supports. In addition to the fact that the $85 figure makes no allowance for various expenses which the daughter no longer has as a result of her mother's death, the use of the maximum life expectancy figure of 8 years is completely unrealistic. The mother's own physician, who had been treating her for a number of years and who was seeing her on the average of every two weeks prior to the accident, testified that she " * * * had arteriosclerotic heart difficulties and coronary and diabetes." He said, referring to her condition 10 days to 2 weeks prior to the accident when he examined her, that "[c]ertainly her condition wasn't good" (A. 50). Another physician testified that a post-mortem examination of the heart showed that there was severe coronary arteriosclerosis " * * * with total occlusion of the anterior descending branch of the distal half of the right coronary artery" (A. 106). He stated that "[d]iabetes had a bad effect on arteriosclerosis

in that the arteriosclerosis is more severe and progresses more rapidly" (A. 107).

By apparently concluding that, absent the accident, the mother would have lived the maximum of her life expectancy, the jury necessarily must have ignored the medical testimony respecting the deteriorating medical condition of the mother.

One further item bears mentioning with respect to the damages allowable under the "Wrongful Death Act." The daughter testified that the mother took care of the beds, did the dishes, helped with the housework, and "did little things around the yard" (A. 31). Normally, a reasonable allowance for such items is permissible (Coleman v. Moore, supra), but here no claim for the items was set forth in the complaint or pretrial order, no evidence as to their value was elicited, and no instructions respecting such items were requested or given. Furthermore, their value would be nominal, because the daughter was paying $36 per month for household help.

Turning now to the $5,000 award under the "Survival Act," such amount, under the facts of this case, represents compensation for two compensable items -- $1,005.85 for medical and hospital ser-

vices,[9] and the remainder of $3,994.15 for decedent's "disabilities." No allowance would have been proper for "probable future earnings" referred to in Hudson v. Lazarus, supra, because (1) the accident did not result, nor could it have resulted, in any diminution of the mother's fixed annuity, and (2) the testimony of the daughter was that the mother spent the entire amount of her annuity.

An allowance of $1,005.85 for medical and hospital services is unquestionably supported by the record, but what justification is there for an award of $3,994.15 for decedent's "disabilities" for the 10-day period between the date of the accident and the date of her death? Undoubtedly, the mother endured pain and suffering during the 10 days that she lived following the accident, but pain and suffering is not compensable under the "Survival Act" (Section 12-101, D. C. Code, 1967).

In Hudson v. Lazarus, 95 U. S. App. D. C. 16, 20, 217 F. 2d 344 (1954), the only case known to counsel for the District in which this Court specifically addressed itself to this element of damages under the "Survival Act," the Court said:

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[9] This is assuming, as we have, that the $1,005.85 item for medical and hospital services was not included in the award under the "Wrongful Death Act."

"Before the accident Hudson worked as a laborer, was in good health, and had no disabilities. After the accident he was stone deaf and could not walk without crutches. A man who cannot hear or walk because of an accident has a physical injury. Unless such disabilities are 'pain and suffering,' the Survival Act does not except them from the physical injury for which damages may be recovered by the legal representative of the injured person.

"We think a disability is not, in itself, 'pain and suffering.' It is not within the ordinary meaning of those words and we see no reason to think Congress used the words in a special sense. A disabled man may or may not suffer pain. Even if he does, after his death his administrator cannot recover for his pain and suffering. But in our opinion his administrator may recover for his disabilities."

The records of the District Court disclose that, upon a remand of that case for the purpose of determining damages, an addition award of $15,000 was approved. Such amount was to include, according to the order on the mandate, an allowance for "(1) the value of all reasonably necessary medical and hospital services furnished by the Bethesda Naval Hospital to Garland Hudson, deceased, (2) an allowance for Garland Hudson's disabilities caused by the negligence and (3) the probable future earnings of Garland Hudson during his life expectancy." Since, according to a deposition on file, $3,201.15 was the value of the medical and hospital services furnished by the Bethesda Naval Hospital, the remainder, or approximately $12,000, included the allowance for

both "disabilities" and the loss of future earnings for the approximately 2-year period between the date of the accident and date of Hudson's death. Such amount, or approximately $16.44 per day ($12,000 divided by 730 days), for both "disabilities" and loss of earnings stands in sharp contrast to the $399.42 per day ($3,994.15 divided by 10 days) approved by the trial court in the instant case for "disabilities" alone.

Ordinarily, of course, an appellate court is hesitant to disturb a jury verdict returned under the "Survival Act" on the basis of a claim that it is merely excessive or inadequate.[10] See Ramsey v. Ross, 66 App. D. C. 186, 85 F. 2d 685 (1936). If the amount is such as to "shock the Court's conscience," however, then the court does not hesitate to disturb it. Hord v. National Homeopathic Hospital, 102 F. Supp. 792, 796 (D. D. C., 1952).

Here, an award of $3,994.15 for disabilities for a 10-day period is excessive by any reasonable standard, and is such as to "shock the Court's conscience."

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[10] The rule is different under our present "Wrongful Death Act," Section 16-2701, D. C. Code, 1967, because it is specifically provided therein that " * * * If, in a particular case, the verdict is deemed excessive the trial judge or the United States Court of Appeals for the District of Columbia Circuit, on appeal of the cause, may order a reduction of the verdict. * * * "

III

The court below erred in admitting into evidence and in permitting the jury to consider, without the benefit of explanatory testimony, exhibit numbered 9.

Since, in a wrongful death action, the jury is required to ascertain the present worth of the sum which it finds the decedent would have bestowed upon the plaintiff had the decedent lived, tools, such as present worth tables, are helpful and, indeed, practically necessary for the jury to do justice to the parties. In order for such tables to be of assistance to the jury, however, they must be adequately explained by someone who has demonstrated to the court that he possesses the necessary qualifications. Otherwise, such tables, rather than assisting the jury in arriving at a just verdict, may have the opposite effect.

Here, the present worth table (exhibit numbered 9) was presented to and accepted by the court without any foundation having been laid for its admissibility, and without any explanatory testimony by a qualified witness. Certainly the table is not self-explanatory. Its short heading adds little to its meaning, and, furthermore, neither the trial judge nor trial counsel for the District understood it (A. 93-94, 96, 98-100).

As to the necessity for a proper foundation being laid, the court, in Emery v. Southern California Gas Co., 72 Cal. App. 2d 821, 165

P. 2d 695, 967 (1946), stated " * * * The annuity tables or charts should have been received in evidence, assuming that a proper foundation for their admissibility had been laid. * * * " (Emphasis supplied.) See also Vicksburg and Meridian Railroad Company v. Putnam, 118 U. S. 545 (1886).

The table was merely handed to the trial judge who, in turn, handed it over to the jury to be taken with them into the jury room. Aside from any formal objection that it was not properly authenticated, the table is so constructed as to likely mislead the jury. Unlike the tables appearing in Figures 11 and 12 of the Appendix to 3 Am. Jur., Proof of Facts, exhibit numbered 9 contains only one rate of interest. Consequently, since no explanation was made, and since the jury was not instructed to the contrary, the jury undoubtedly believed that it was bound by such an interest rate. The law, however, as stated in O'Connor v. United States, 269 F. 2d 578, 585 (2nd Cir., 1959), is that:

> "The rate is to be determined by the trier. The rule is that there should be applied for such discount the rate which persons without financial skill could safely secure on their investments. * * * "

As is apparent from the tables in 3 Am. Jur., Proof of Facts, supra, any increase in the interest rate results in a lower verdict. It can hardly be assumed that the jury was sufficiently sophisticated to be

aware of this, or that it was knowledgeable regarding the prevailing interest rates on various types of investments. The trial judge's lack of knowledge in this regard is evidenced by his question to counsel for the daughter:

> "And here you have the three and a half per cent. I don't know how you arrived at that. Is that the prevailing interest rate in this?" (A. 98.)

Certainly, if the court didn't know how the 3 1/2 per cent rate was determined, the jury could not be expected to know.

Other portions of the exhibit are just as misleading and confusing. Only by comparing exhibit numbered 9 with other present worth tables, such as those previously mentioned in 3 Am. Jur., Proof of Facts, supra, is it possible for anyone, other than an actuary, to determine that column 2 represents the present value of one dollar per year payable at the end of each year for a specified number of years. From exhibit 9 itself, one cannot tell whether it represents the value of a sum of money payable at the end of each year or at some greater or lesser period of time. Yet the jury, without any explanation forthcoming from any qualified witness, was handed the table, presumably for the purpose of ascertaining the present value of the sum which the daughter would have received from the mother had the mother lived. We say

presumably because, as shown in Argument IV, infra, the jury was not so instructed.

Since exhibit numbered 9 is not self-explanatory and was admittedly not understood by either the trial judge or trial counsel for the District, it can hardly be assumed that it was understood by the 12 jurors. Therefore, its admission in evidence without being duly authenticated and adequately explained by a qualified witness was sufficiently erroneous as to warrant the granting of a new trial.

IV

The trial court's instructions on damages were erroneous, confusing, and misleading to the jury.

The trial court's charge to the jury on damages was such a hodgepodge of erroneous, duplicitous, and incomplete statements of the law pertaining to damages under the "Survival Act" and "Wrongful Death Act," that no jury could possibly determine what elements of damages were applicable to each Act, or the manner in which the jury should proceed in ascertaining the extent, if any, of certain elements of damages.

For example, there is no basis or justification, whatsoever, in the record for the court's charge under the "Survival Act" that an

allowance could be made for "decedent's probable future earnings during her life expectancy" (A. 127). As previously stated, the daughter testified that the mother spent the entire amount of her monthly annuity. In addition, the annuity was fixed and could not have been affected in any respect by the happening of the accident. Therefore, since loss of earnings could not have been an element of damages in a claim filed by the mother, had she lived, it necessarily follows that it cannot be an element of damages in a claim filed by the legal representative of the estate. Consequently, the failure of the court to sustain the District's objection to such a charge (A. 133) permitted the jury to make an allowance for an item which, under the facts of this case, is not compensable.

That the jury was confused from the court's charge is apparent from the rather nonsensical question it propounded to the court after deliberating for some period of time. The question was "Your Honor, does the life expectancy come under the survival act or the wrongful death act?" (A. 137-138). Although the answer given, i.e., that it "applies only to the wrongful death act" (A. 142), was perhaps the best that could be given under the circumstances, it did not nor could it have had the effect of clarifying the duplicitous charge. The court's charge still remained intact that the jury could make an allowance under the

"Survival Act" for loss of earnings for at least some period of time even though the accident resulted in no diminution of the mother's monthly annuity, and even though the mother each month admittedly spent the entire amount of her annuity. In addition, the charge of the court still remained deficient under the "Wrongful Death Act" in that the jury was not told, at any time, that it was to discount to its present worth the amount it found the daughter would have received from the mother during the mother's lifetime had the mother lived.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the daughter failed to prove that the District of Columbia either created or negligently permitted a dangerous condition to exist on public space. In addition, reversible error was committed in connection with the assessment of damages under both the "Wrongful Death Act" and "Survival Act." Consequently, the judgment should be reversed and the cause remanded to the court below with directions to enter judgment for the District of Columbia or, in the alternative, with directions to grant a new trial under both Acts on the issue of damages. Alternatively,

this Court should exercise its authority under the "Wrongful Death Act" and substantially reduce the amount awarded under that Act.

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August 30, 1968

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,029

DISTRICT OF COLUMBIA,
Appellant,

v.

ELIZABETH W. FRITZ,
Administratrix, c.t.a., of the Estate of
Elizabeth M. Fritz,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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INDEX

SUBJECT INDEX

ISSUES PRESENTED FOR REVIEW 1

COUNTER-STATEMENT OF THE CASE 2

ARGUMENT

I. *The Evidence Was Sufficient to Sustain Verdict and Judgment for Plaintiff on The Question of Liability* 6

II. *The Verdict and Judgment for the Plaintiff for $15,000 Under the Wrongful Death Act and $5,000 Under the Survival Act Were Supported by the Record and Were Not Excessive* 12

A. *Wrongful Death Act* 12

B. *Survival Act* 18

III. *The Trial Court Properly Took Judicial Notice of An Annuity or Present Worth Table Offered In Evidence By Plaintiff* 23

IV. *The Trial Court Correctly Instructed the Jury On the Question of Damages* 30

CONCLUSION 31

CASES CITED

* *Baltimore & P.R. Co. v. Mackey*, 157 U.S. 72, 39 L.Ed. 624, 15 S.Ct. 491 31

Broder v. District of Columbia, 184 A.2d 741 (Mun.App.D.C. 1962) . . 7

* *Bruner v. McCarthy*, 105 Utah 399, 142 P.2d 649 (1943) 29

* *Chicago & N.Y.R. Co. v. Candler*, 283 Fed. 881 at 883 (C.A. 8, 1922) . . . 30

* *Christie v. Callahan*, 75 U.S.App.D.C. 133, 124 F.2d 825 (1941) 8

* *Coast S.S. Co. v. Brady*, 8 F.2d 16, 19 (C.A. 5, 1925) 29

* *Costello v. District of Columbia*, 21 D.C. 508 (1893) 7

Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356 (1943) 21

District of Columbia v. Randle, 95 U.S.App.D.C. 23, 217 F.2d 669 (1954) 7

District of Columbia v. White, 48 App.D.C. 44 (1918) 8

District of Columbia v. Williams, 46 A.2d 111 (Mun.App.D.C. 1946) . . 8

District of Columbia v. Woodbury, 136 U.S. 450, 10 S.Ct. 990 (1890) 8, 30

Elliott v. District of Columbia, 82 U.S.App.D.C. 64, 160 F.2d 386 (1947) 8

Finney v. District of Columbia, 47 App.D.C. 48 (1917) 8

* *Guenther v. Metropolitan Ry. Co.*, 23 U.S.App.D.C. 493 (1904) 9

* *Hord v. National Homeopathic Hospital*, 102 F.Supp. 792 (D.C.D.C. 1952) 12, 13, 15

* *Hudson v. Lazarus*, 95 U.S.App.D.C. 16, 217 F.2d 344 (1954) 19, 20, 21, 22

Leary v. District of Columbia, 166 F.Supp. 542 (D.C.D.C. 1958) 7

Louisville & Nashville R. Co. v. Holloway, 246 U.S. 525, 38 S.Ct. 379 (1918) 30

* *Matthews v. Nelson*, 57 N.J.Super. 515, 155 A.2d 111 29

McManus v. New Jersey Water Co., 22 N.J.Super. 253, 91 A.2d 868 (App.Div. 1952) 8

McNair v. Berger, 92 Mont. 441, 15 P.2d 834, 838 (1932) 29

* *McNamara v. Dionne*, 298 F.2d 352 at 355-356 (C.A. 2, 1962) 31

* *National Homeopathic Hospital v. Hord*, 92 U.S.App.D.C. 204, 204 F.2d 397 (1953) 12, 13

* *Philadelphia B &W R. Co. v. Tucker*, 35 U.S.App.D.C. 123 (1910) 29

* *Rankin v. Shayne Brothers, Inc.*, 98 U.S.App.D.C. 214, 234 F.2d 35 (1956) 18

Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957) 31

Sornborger v. Dental Laboratory Inc., 105 U.S.App.D.C. 290, 266 F.2d 694 (1959) 21

* *The Washington Hospital Center v. Cheeks*, No. 21,364, ___ U.S. App. D.C. ___ (1968) 26

Turrietta v. Wyche, 54 N.Mex. 5, 212 P.2d 1041 (1949) 29

* *United States Electric Lighting Co. v. Sullivan*, 22 App. D.C. 115 (1903) 30, 31

* *Vicksburg & M.R. Co. v. Putnam*, 118 U.S. 545, 7 S.Ct. 1 (1886) 27
* *Wei v. Robinson*, 246 F.2d 739 (C.A. 7, 1957) 25

STATUTES

* 44 U.S. Code, Section 307, 311 24
Rule 51, Federal Rules of Civil Procedure 31

OTHER AUTHORITIES CITED

Am.Jur.2d, Desk Book, 239 ..... 24, 25
16 Am.Jur., Proof of Facts 27
Federal Register, 49 Stat. 502
50 Stat. 304 25
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§ 54.104 ..... 6, 7

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,029

DISTRICT OF COLUMBIA,
Appellant,

v.

ELIZABETH W. FRITZ,
Administratrix, c.t.a., of the Estate of
Elizabeth M. Fritz,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

ISSUES PRESENTED FOR REVIEW

In the opinion of appellee the issues are:

1. Whether the evidence was sufficient to sustain the verdict and judgment for plaintiff against the District of Columbia on the question of liability.

2. Whether the verdict and judgment for $5,000 under the Survival Act and $15,000 under the Wrongful Death Act were supported by the record and were not excessive.

3. Whether the trial court correctly took judicial notice of present worth table offered in evidence by plaintiff.

4. Whether the trial court correctly instructed the jury on the question of damages.

COUNTER-STATEMENT OF THE CASE

The appellee [hereafter referred to as "plaintiff"], is the adult daughter and sole surviving heir of the decedent, ELIZABETH M. FRITZ. Plaintiff brought an action under both the Wrongful Death Act and the Survival Act for injuries resulting in the death of her mother. The mother was fatally injured at approximately 7:30 p.m. on the evening of Saturday, October 24, 1964, when she fell in a large hole in a grass strip or area located between the curb and paved sidewalk near the Church of the Annunciation at 3810 Masachusetts Avenue, N.W. in the District of Columbia [A. 14, 21-25]. There is no dispute that the parking strip in question was under the jurisdiction and control of the District of Columbia [hereafter referred to as "defendant"]. Pedestrians frequently traveled over this area to get to the church from their parked automobiles [A. 79].

The plaintiff and her mother were going to confession at the church in question, and the plaintiff parked their automobile close to a "no parking" sign located near a paved area leading to the church entrance [A. 21]. The mother opened her door and stepped from the automobile, starting to walk between the curb and the paved sidewalk parallel to Massachusetts Avenue, N.W. After the mother had taken about two steps, she fell into a hole where a tree had been removed by the defendant [A. 16, 24]. The plaintiff slid across the seat of the automobile and followed her mother, vainly

attempting to catch her when the mother fell in the hole and sustained severe injuries including a fractured hip resulting in her death ten days later [A. 23-25].

The hole where the mother fell was described by four witnesses to be six to nine inches in depth and one and one-half to two feet in diameter [A. 15, 25, 76, 83]. The hole at the time in question, as well as the adjacent ground, was completely covered by fallen leaves [A. 12, 14, 24, 76]. There were no street lights nearby and the lighting condition was described by plaintiff and two other witnesses as "very poor" [A. 15, 20, 27, 72]. There were no barricades, warning lights or other warning devices of any kind at or around the hole in question [A. 26, 121-122]. The defendant, by answers to interrogatories, admitted that the tree in question had been planted on March 18, 1964, and was removed by the defendant's employees on October 16, 1964, eight days prior to the fall and injuries complained of [A. 92, 115].

The Police Department of the District of Columbia was promptly notified of the accident and on the very evening of the injury, defendant's police officers came to the scene and made an investigation. None of the police officers or other investigating agencies of the defendant were called by the District to testify at the trial [A. 78, 108].

After the fall plaintiff called her mother's physician, Dr. Andrew K. Bowie, and immediately drove her mother to Casualty Hospital where it was determined she had sustained a fractured hip [A. 30]. Surgery was performed on the mother on October 26, 1964, and she died from her injuries eight days later, on November 3, 1964. Dr. Bowie testified that the cause of the mother's death was the fracture of the hip sustained in the fall, together with the bone surgery and insertion of a metal pin performed in the course of her medical

treatment [A. 48, 58, 81-82]. The hip injury was a permanent injury [A. 81].

Plaintiff testified that her mother had been under treatment for diabetes since 1950, which was controlled by insulin shots she administered daily [A. 36]. Dr. Bowie stated that the diabetic condition was stable and controlled [A. 41-42].

In May, 1964, the mother had suffered a moderate heart attack for which she was hospitalized about a month and from which she had made a full recovery [A. 43]. After leaving the hospital in June, 1964, the mother resumed her normally active and busy life and never suffered any other heart problems [A. 34-35]. The testimony of five lay witnesses (Ethel Davis, Thomas Keane, Jane Cox, Ada Whinnery and Elizabeth Keane) showed that the mother performed housework, cooked meals, cleaned, walked, entertained, actively participated in activities at the beach over the summer, and otherwise enjoyed good health immediately prior to the injury [Tr. 126-127; 131-132; 139-140; 182-183; 186-188]. The testimony of these five witnesses was not printed in the Appendix, although requested by plaintiff, and hence references are to pages of the Transcript of Testimony.

Plaintiff testified that the condition of her mother was very good following her release from the hospital in June, 1964, and that she continued to perform her normal duties at her residence and also at the beach cottage [A. 34, 35]. She performed household duties, cooked, washed dishes, made beds and went up and down steps in a normal fashion [A. 34-35]. The mother's regular attending physician, Dr. Bowie, testified that he gave her a complete examination about two weeks immediately prior to her injury on October 24, 1964, and that medically she appeared at that time to be "quite satisfactory" [A.44]. The doctor's examination consisted of testing blood pressure, heart action, urine for sugar and checking the regu-

lar medication which controlled the diabetic condition [A. 44]. Dr. Bowie testified:

> "Q. I believe you were asked questions with reference to a stroke. Had you been the attending physician and the family doctor of Mrs. Fritz for the long period of time you described?
>
> "A. I was.
>
> "Q. Did you ever see any indications of any kind of stroke?
>
> "A. No, I never did." [A. 81].

Plaintiff also testified:

> "Q. Prior to your mother's injury, did she ever have a stroke or anything of that kind?
>
> "A. No.
>
> "Q. Was she ever paralyzed even slightly or partially?
>
> "A. No, she wasn't." [A. 61].

Defendant's brief states at page 4 that a post mortem examination of the mother by the defendant's physician, Dr. Mann, "revealed that a few months prior to the accident she had sustained a stroke." In fact, Dr. Mann testified that his autopsy showed "an old cystic cerebral infarct" and that "I did not find in the brain any evidence of recent injury or any other recent abnormality." [A. 104, 105].

Dr. Bowie testified that it was his opinion that but for the injuries, the mother would have lived into her eighties. He reasoned that because she had overcome the coronary and diabetes, she probably could have attained advanced years [A. 55].

Julius Stickell testified on behalf of the defendant that he was in charge of the crew which removed the tree in question. He did not know of the accident at that location until two or three years

later. He purported to refresh his memory from a written record showing 51 tree removals on October 16, 1964 [A. 111, 112]. However, Mr. Stickell claimed that his memory was triggered by his recollection that the date in question (October 16, 1964) was a *Saturday*; that it was unusual for him to work on Saturday because his regular work week was Monday through Friday; that this was a special order for Saturday work; that the unusual fact of Saturday work caused him to remember this particular tree and hole—when in fact, the day the tree was removed (October 16, 1964) was a *Friday*.

He also admitted that he never returned to check the area after the tree was removed, that being the duty of the area manager of the District of Columbia (who was never called as a witness), and that no barricades, lights or warnings of any kind were placed at the area where the tree was removed [A. 122, 123].

ARGUMENT

I. The Evidence Was Sufficient To Sustain Verdict and Judgment for Plaintiff on the Question of Liability.

The defendant has contended that the plaintiff was required to prove that the District of Columbia had notice, actual or constructive, of the dangerous condition. This is not the correct rule of law in the instant case because the evidence showed that the hole was created by the positive action of the defendant in removing a tree from the parking strip between the curb and the sidewalk.

In 19 McQuillin, Municipal Corporations (1967 Revised Volume), § 54.104, p. 291, the principle is stated as follows:

> "In seeking a recovery against a city for injuries due to an allegedly defective public way, it is only where the negligence relied on is the failure of the

> city to remove an obstruction or to repair a defect in the street, not caused by its own act or neglect, that the question of notice of obstruction or defect is an essential element. If the defective condition is due to the act of the municipality itself, or its act or negligence in connection with the acts of others, or to the acts of others as of its contractors or employees, no notice of any kind, either actual or constructive, is necessary." [Citing cases]

In *Costello v. District of Columbia*, 21 D.C. 508 (1893), it was held that where the District of Columbia authorized excavations in a public street so as to leave the street in an unsafe condition for pedestrians, the District at once became chargeable with the duty to see that proper safeguards were provided to prevent accidents. See also, *Leary v. District of Columbia*, 166 F.Supp. 542 (D.C.D.C., 1958); *District of Columbia v. Randle*, 95 U.S.App.D.C. 23, 217 F. 2d 669 (1954).

The liability of the defendant as a question of fact for the jury in cases involving injuries in the grass plot between the street curbing and sidewalk was set forth in *Broder v. District of Columbia*, 184 A.2d 741 (Mun.App.D.C., 1962) at p. 742:

> "This space is not a part of the sidewalk, nor is it intended to be used as such. However, this does not obviate the responsibility of the District to exercise reasonable care in the *construction* and maintenance of the area so that it will not be a menace to pedestrian safety. The District is liable for injuries caused by construction defects or improper maintenance of such spaces. Whether the area was in a dangerous condition is *usually a question of fact for the jury*.
>
> "In the cases we have examined the injured parties have based their claims for damages upon dangerous

> conditions in grass plots due to holes, uneven depressions of the surface where the ground has been washed and tramped out, and the presence of a hitching post, all of which were *properly submitted to juries* for determination of whether the District had been negligent in permitting a dangerous condition to exist." [Emphasis supplied]

To the same effect, see *Elliott v. District of Columbia*, 82 U.S.App. D.C. 64, 160 F.2d 386 (1947); *District of Columbia v. White*, 48 App.D.C. 44 at 48 (1918); *Finney v. District of Columbia*, 47 App. D.C. 48 at 51 (1917); *District of Columbia v. Williams*, 46 A.2d 111 at 113 (Mun.App.D.C., 1946); *McManus v. New Jersey Water Co.*, 22 N.J.Super. 253, 91 A.2d 868 (App.Div., 1952).

The only case cited by the defendant, *District of Columbia v. Woodbury*, 136 U.S. 450, 10 S.Ct. 990 (1890), does not require the plaintiff to prove notice to the defendant where the latter's affirmative conduct caused or created the dangerous condition. At p. 996, the Court stated:

> "The burden is on the plaintiff to prove either that the thing was originally dangerous, or had become so long enough before the accident for the authorities to have known it, so as to impose upon them the obligation to put it in proper condition."

The function of the reviewing court in passing on the sufficiency of evidence to sustain a verdict was described by Judge Rutledge in *Christie v. Callahan*, 75 U.S.App.D.C. 133, 124 F.2d 825 (1941) at p. 134, as follows:

> "Our function is not to weigh the evidence factually as the jury does. It is to decide whether plaintiff's case, as made, was strong enough for us to allow the jury to consider it. To do this we must apply

> some standard. But we cannot weigh plaintiff's case against defendant's. Less than preponderance is sufficient. How much less is hard to state abstractly. Commonly the case weighed, to stand, is required to be substantial, more than a scintilla, such as a reasonable man might believe. All these are just different ways of saying that less than preponderance is required but the evidence should not be so thin that it would be dangerous for the jury to consider it." See also *Guenther v. Metropolitan Railroad Co.*, 23 U.S.App. D.C. 493 (1904).

The record here contains ample facts from which the jury could reasonably infer that the hole in question was created and permitted to exist in a dangerous condition by the defendant. The defendant's answers to interrogatories established that the defendant planted a tree on the site of the hole on March 18, 1964, and on October 16, 1964, the defendant itself removed the tree. Certainly, the existence 8 days later (October 24, 1964) of a hole six to nine inches deep and one and one-half to two feet wide was sufficient to permit the jury to infer that the hole was created and permitted to remain in such condition during the eight-day period. Fathers Farrell, Dooley and the plaintiff all testified to the size and depth of the hole and its location at the spot where a tree maintained by the defendant formerly stood.

The only conflict in evidence created by the defendant came from the incredible testimony of its employee, Julius Stickell. Mr. Stickell was the foreman of the crew which removed the tree in question. However, his credibility was substantially and adversely impeached by a number of factors. In the first place, he was not apprised that there had been an injury at the site of this tree until two and one-half to three years after the removal of the tree [A. 118]. Obviously, he could not remember the removal of any particular tree from hundreds of trees removed by the District during

this period of time. Apparently realizing the doubtfulness of his ability to have a specific memory when there was nothing to call it to his attention at the time, the witness proceeded to testify repeatedly and positively that his memory was refreshed by the fact that the tree was removed on a *Saturday*. His normal work week was Monday through Friday, but he testified on this particular occasion it was a special order requiring him to take the crew out on a Saturday [A. 116, 119]. Mr. Stickell testified as follows:

> "A. This was a special order that we had. I was ordered to take the crew out that morning and that is why it was a Saturday, special job, taking the small trees up.
>
> "Q. What were your normal days of work during the week at that time in October, 1964?
>
> "A. Trimming trees and removing trees, large trees mainly.
>
> "Q. You didn't understand me. What were the days of the week that you worked for the District in October, 1964?
>
> "A. Monday through Friday.
>
> "Q. And then the fact that this occurred on a Saturday was what made it unusual and caused you to remember it?
>
> "A. Yes, and we had work but one Saturday, that one Saturday.
>
> * * *
>
> "Q. But Saturday working was unusual for you and that crew, wasn't it?
>
> "A. That is true.
>
> "Q. Normally you worked Monday through Friday but you remember this because it was a Saturday?

"A. Yes." [A. 119, 120]

Unfortunately for the witness, his memory and his credibility, it was unquestionably established by the record that the tree was removed on Friday, October 16, 1964 [A.112]. The written records of the District of Columbia showed the removal of the tree in question on October 16, 1964 [A. 111, 112, 122]; the injury occurred on Saturday, October 24, 1964 [A. 19]. The calendar also bears out the correctness of the day of the tree removal being Friday. Inasmuch as Mr. Stickell's memory was anchored to the "unusual" fact that the work was done on a Saturday, a non-working day, the jury could doubt his memory as to either the tree removal or what, if anything, was done with the remaining hole. Certainly the existence of a large hole eight days after the admitted removal of the tree further justified the jury in inferring that the hole could not have been filled in properly at the time the tree was removed.

Mr. Stickell did not testify that a mound "two to three inches" was placed on the hole in question [A. 114]. In fact, the testimony alluded to by the defendant in its brief shows Mr. Stickell was testifying how a tree should be removed, not how it was done in this case [A. 113]. In addition, Mr. Stickell admitted that no barricades, lights or warnings of any kind were placed at the site of the removal of the tree [A. 121, 122]. He further admitted that he never returned to the spot where the tree was removed to inspect its condition, because that was somebody else's job, the area manager of the District of Columbia. Inasmuch as the area manager was not produced, the jury could infer either that no sufficient inspection was made by this employee of the defendant or that inspection revealed the continued existence of the dangerous condition created by the defendant.

II.

The Verdict and Judgment for the Plaintiff for $15,000 Under the Wrongful Death Act and $5,000 Under the Survival Act Were Supported by the Record and Were Not Excessive.

A. *Wrongful Death Act.*

While the amount of damages in a death case is left to the discretion of the jury, it has been held that the general rule is that substantial damages should be awarded in any death case in which the plaintiff prevails regardless of the age of the deceased. This principle is well analyzed in *Hord v. National Homeopathic Hospital,* 102 F. Supp. 792 (D.C.D.C., 1952); the reasoning in the opinion of the District Court was expressly approved on appeal in *National Homeopathic Hospital v. Hord,* 92 U.S.App.D.C. 204, 204 F.2d 397 (1953). In the District Court opinion at p. 793, the Court said:

> "The objective of the statutes that created a cause of action for death caused by the negligent act of another was to fill a serious gap or omission in the common law. Their objective was to ameliorate the harsh rule that denied any recovery if the injured person died, while permitting an award of damages if he lived. Such statutes must be construed and applied in the liberal spirit contemplated by their framers and with a view to effectuating their purpose. . . .
>
> "Ordinarily such statutes limit the damages to the pecuniary loss sustained by the family of the deceased. No compensation is permitted for grief, mental anguish, or sentimental loss. Probably the purpose of this restriction is to confine the amount of damages within the reasonable bounds and to prevent improvident and extravagant awards. On the other hand, this limitation must not be used to defeat the humanitarian objective of the statutes and to limit recovery to nominal damages. The pecuniary loss resulting from the death of a member of the family cannot be ascertained

with precision or computed with accuracy. True, in the case of an adult, the income of the deceased and his earning capacity form a partial basis for a conclusion. Even in such a situation, however, an element of change and conjecture enters into the determination, because if the deceased had not lost his life as a result of the defendant's negligence, he might have died shortly thereafter in another accident or from some natural cause. For this reason mortality tables furnish some guide even though they are based entirely on averages. . . .

"The law does not differentiate between the death of an adult and the death of an infant. Consequently, the general rule is that substantial damages should be awarded in any death case in which the plaintiff prevails, irrespective of the age of the deceased."

In the *Hord* case, the jury awarded a verdict of $17,000 for the death of a three-day old child, which was affirmed on appeal.

Clearly, the plaintiff is entitled to recover for all pecuniary loss of any kind which the next of kin has sustained as a result of the death of the mother. The defendant attempts to play a kind of numbers game whereby this court is asked to make numerous deductions from the pecuniary benefits realized by the daughter during her mother's lifetime and to conclude that the mother's life was practically worthless. Complaint is further made that the jury may have placed a value of approximately $155 per month upon the pecuniary benefits and then allowed the present worth of such contributions over a life expectancy of approximately eight years.

The evidence shows that the plaintiff was requested to and did in fact live with her mother without charge in the home owned by the mother [A. 37, 39, 69]. The mother made monthly mortgage payments of $100 which had increased prior to trial to $114 because of increases in taxes [A. 37, 67]. The mother paid approximately $20 per month for utilities and an additional monthly average of

$20 for heat [A. 38]. She also spent an average of $15 per month for trips furnished to the plaintiff. The defendant argues that the daughter received no net benefit for such expenditures because of contribution made by the latter for food, drugs, and household help. However, the defendant conveniently ignores additional evidence in the record which shows that not only should such payments by the daughter not be deducted, but rather additional losses were in effect sustained by her by the loss of services rendered by her mother.

In the first place, the value of the home in which the daughter lived rent-free is not limited to the bare mortgage payments, whether deemed to be $100 or $114. The evidence shows that the plaintiff had the free use of a six-room home consisting of living room, dining room, kitchen and bathroom on the first floor as well as three bedrooms and related facilities on the second floor [A. 18, 19]. The house was located at 4412 Lowell Street, N.W. in the District of Columbia, which the jury could infer was a desirable residential area. From the station and mode of living of the mother as testified by the five omitted witnesses, the jury could also have inferred that such home was comfortably furnished. From all of the circumstances in the record, the jury would have been justified in inferring that the value of the use of such home could alone amount to more than $155 per month.

Defendant also contends that since the plaintiff paid $40 per month for food, this amount should be deducted. On the contrary, the evidence shows that the plaintiff was a school teacher who presumably spent the greater portion of her time teaching school, correcting papers and performing other similar duties [A. 18, 31, 65]. The jury therefore could properly infer that in return for payment of $40 for food, the plaintiff received her meals at home prepared by her mother who did the cooking, washed the dishes and otherwise performed services directly related to the meals. Hence, instead

of deducting $40, an additional sum could have been inferred by the jury to have been lost by the daughter by having to buy her meals, which common knowledge indicates would far exceed $10 per week or $40 per month.

In addition, defendant seeks to deduct $36 per month for household help on the basis of testimony that once a week household work was performed by a maid who was paid $9.00 therefor [A. 68]. Here again, the testimony of the omitted five witnesses as well as plaintiff shows that the mother performed much of the housework in the family home including dusting, mopping, preparation of meals, washing dishes, cleaning, ironing, making beds and the like [A. 34-35; Tr. 126-127, 131-132, 139-140, 182-183, 186-188]. Obviously the reasonable value of such services far exceeded the $9.00 for one day per week paid for household help. The jury could reasonably have inferred that if $9.00 was the value of one day's work as performed by a maid, the value of household work performed by the mother on the other six days of the week could well amount to six times such sum, or $54.00 per week or $216 per month. Here again, instead of deducting $36, substantial additional sums should be added to ascertain the pecuniary loss of the daughter.

The defendant also errs in assuming in its argument that the eight years life expectancy of the mother should not have been considered by the jury. In four different places in its brief, the defendant refers to the eight year life expectancy as the "maximum" life expectancy [App.Br. pp. 18, 19, 20]. This is a misconception of the function of mortality tables. As the court observed in *Hord v. National Homeopathic Hospital*, 102 F.Supp. 792 (D.C.D.C., 1952) at p. 794:

> "mortality tables furnish some guide even though they are based entirely on *averages.*" (Emphasis supplied).

The eight years of life expectancy was not a maximum, but rather merely showed an average period of remaining life expectancy which the jury, as the ultimate finder of fact, could determine to be either higher or lower. This principle was recognized by the trial judge in the instant case when he said:

> "Now, I would look to these tables in the same vein that they are not binding on the jury but they are merely a tool that the jury may use in arriving if they conclude that the woman—They might conclude she was going to live 15 years. I don't know. They might conclude she was going to live a year, six months. Whatever their determination might be. Again, this would be merely a tool that they could use." [A.97].

The court further recognized and brought to the attention of the jury the point that such mortality tables were not controlling, either as a maximum or minimum, but were to be considered together with all the evidence in the record. In the court's instructions to the jury, the following charge was given:

> "According to the Health, Education and Welfare table of mortality the expectancy of life of one age 78 years is 8 years. This fact of which the Court has taken judicial notice is now in evidence to be considered by you in fixing damages, if you find that the plaintiff is entitled to a verdict. However, this one factor of evidence is not by law controlling but should be considered in connection with all the other evidence bearing on the same issues such as that pertaining to the health, habits and activity of the person whose life expectancy is in question." [A. 129].

To aid the jury in determining the decedent's probable life expectancy by presenting evidence as to her physical condition and state of health, the plaintiff called the following five witnesses: Ethel

Davis, Tr. 126, 127; Thomas Keane, Tr. 131, 132; Jane Cox, Tr. 139, 140; Ada Whinnery, Tr. 182, 183; and Elizabeth Keane, Tr. 186-188. Page references are to the Transcript of Testimony because such testimony was not included in defendant's Appendix.

All five witnesses testified in substance that they were well acquainted with the decedent, had known her for many years and saw her and visited with her frequently. They testified that in May, 1964, she was hospitalized with what they learned was a heart condition, but that their observations of her in the hospital showed that she was in no pain or discomfort of any kind and she evinced no disability therefrom. Following her release from the hospital, they testified that, as before, she was a very active person; she did all of the housework in her home where the plaintiff also resided with the exception of hired help once a week; she did all of the cooking, cleaning, washing dishes, dusting, mopping, ironing, made beds, sewed, crocheted and performed other houshold chores; she had an active social life, enjoyed entertaining and was active in her church and club work; she worked in her yard and garden; and at the beach she performed household chores, climbed stairs, walked and led an active physical life, and otherwise enjoyed good health immediately prior to her injury.

In determining whether there was any evidence sufficient to sustain the plaintiff's verdict, the jury should be permitted to make appropriate inferences from the evidence and determine the credibility of witnesses and weight to be accorded the evidence on the subject of probable life expectancy of the mother. Since the mortality tables are simply a tool, the jury had the right to make such determination from the entire evidence as to the mother's state of health, physical activity and the like. Certainly, eight years was not the maximum, and the jury under the evidence could have reasonably concluded that she might have attained a greater age but for the negligence of the defendant.

As observed by Dr. Bowie, her condition for a person her age was average [A. 41]; her diabetes was stable and controlled for many years [A. 41]; after her coronary her condition was very good [A. 43]; with her medical history she would have lived into her 80's [A. 55]. Dr. Bowie explained that having attained age 78 with the physical conditions described and having survived her coronary and other disabilities, this was one of the main reasons why she could have been expected to live much longer. Dr. Bowie further testified that he gave the mother a complete examination about two weeks prior to her injury which consisted of testing the blood pressure, heart, urine for sugar content and checking the regular medication which controlled the diabetic condition. From this examination, he concluded that she appeared at that time to be "quite satisfactory" [A. 44].

Dr. Bowie's opinion was further corroborated by the internal evidence of the mortality tables themselves. For example, the plaintiff at age 52 had a life expectancy of 26.8 years. This simply means that as of that age, she could expect to live to the age of 78.8. However, a person at age 78 (such as the mother) had a life expectancy of 8 years. Hence, on an average expectancy, she could attain the age of 86 years. Obviously, the prospect of a person attaining a greater age increases as such person grows older and survives the vicissitudes of life.

B. *Survival Act.*

The defendant objects to the verdict of $5,000 to the plaintiff for damages under the Survival Act. Inasmuch as the medical and hospital bills amounted to $1,105.85, the contention is made that the remainder of $3,994.15 for permanent disability is excessive. In passing upon similar challenges to verdicts, the Court in *Rankin v. Shayne Brothers, Inc.*, 98 U.S. App. D.C. 214, 234 F.2d 35 (1956), stated at p. 37 as follows:

"This Court, like courts generally, has been reluctant to set aside jury awards for personal injuries on the ground of either excessiveness or inadequacy, assuming constitutional power to do so. *Coca Cola Bottling Works v. Hunder*, 95 U.S.App.D.C. 83, 219 F.2d 765; *National Homeopathic Hospital v. Hord, supra; Frasca v. Howell*, 87 U.S.App.D.C. 52, 182 F.2d 703; *Dean v. Century Motors*, 81 U.S.App.D.C. 9, 154 F.2d 201; *Ramsey v. Ross*, 66 App.D.C. 186, 85 F.2d 685; cf. *Hulett v. Brinson*, D.C.Cir., 229 F.2d 22. And in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481, 53 S.Ct. 252, 254, 77 L.Ed. 439, it is said:

> ' * * * The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.'"

Hudson v. Lazarus, 95 U.S.App.D.C. 16, 217 F.2d 344 (1954) is the leading case in the District of Columbia relating to damages recoverable under the Survival Act. In that case, the plaintiff's decedent sustained personal injuries but died while the action was pending, which was then continued in the name of the administratrix. The administratrix sought to amend the complaint by adding a claim for wrongful death, but she was held to be barred by the one-year limitation of actions on a death claim. The trial court limited the plaintiff's verdict to the "pecuniary loss" which the decedent suffered in his lifetime. The reviewing court held this to be erroneous stating at p. 346:

> "In our opinion damages should have included in addition (1) the value of all reasonably necessary medical and hospital services furnished without charge by Bethesda Naval Hospital; (2) an allowance for Hudson's disabilities caused by the accident; and (3) his probable future earnings during his life expectancy, discounted to present worth."

The Court held that since prior to the accident, decedent was in good health and had no disabilities and thereafter he could not hear or walk, he had sustained a physical injury. Such disabilities were held not to be "pain and suffering" which the Survival Act excludes as an element of damage. Accordingly, the administratrix was permitted to recover for such disability on the grounds that a disabled man may or may not suffer pain, but a disability in itself is not pain and suffering. In addition thereto, it was held that if the decedent in his lifetime had recovered a judgment his damages also could have included an allowance for prospective loss of earnings during his normal life expectancy discounted to present worth. When he died his right to these additional damages passed under the Survival Act to his administrators. The Court stated at p. 349:

> ". . .But the District of Columbia Code does not create the injured person's claim. His claim which (except for 'pain and suffering') survives, is the broad common-law claim for physical injury.
>
> "The case will be remanded so that the elements of damage we have discussed may be added to the present judgment of $6,050. In other respects the judgment is affirmed."

An analysis of the *Lazarus* case shows that in addition to the pecuniary loss sustained in his lifetime, the decedent was entitled to three additional and separate elements of damage—the value of collateral medical and hospital services; an allowance for disabilities; and

probable future earnings. Since disabilities caused by the accident were thus specifically enumerated separately and apart from probable future earnings, it demonstrates that the plaintiff in this case was likewise entitled to allowance for permanent physical disability sustained by her mother.

Defendant purports to examine amounts of recovery awarded in a subsequent trial in the *Lazarus* case for the purpose of determining additional damages. It is questionable whether it is proper to cite District Court files of an unreported case in an appellate brief because it is not the function of this Court or counsel to ransack District Court dead files or attempt to retry another case. It is sufficient to note that, as declared in *Crane v. Smith*, 23 Cal. 2d 288, 302, 144 P.2d 356 (1943):

> ". . . The appellant's claim that the amount of damages awarded. . . is excessive, concerns an issue which is primarily factual in nature and is not therefore a matter which can be decided upon the basis of the awards made in other cases . . . .[D]amages are not excessive as a matter of law because a lesser amount has been deemed adequate compensation for a similar injury."

It has been held in the District of Columbia that an act of negligence causing death can give rise to two separate and independent claims, one under the Wrongful Death Act and another under the Survival Act. *Sornborger v. Dental Laboratory Inc.*, 105 U.S.App. D.C. 290, 266 F.2d 694 (1959). Of course, double recovery may not be obtained for the same items of damage. However, in the instant case the court clearly instructed the jury that double recovery should not be awarded for the medical and hospital bills by the following instruction:

> "Members of the jury, I would instruct you further pertaining to the claim of the plaintiff under the

> survival statute as well as under the wrongful death act. You will Recall that I indicated that if you found a verdict for the plaintiff that among other items you could consider would be the medical and hospital bills. If you would find under either act you cannot find the same items under both. In other words, you can't find for the medical and hospital bills twice." [A. 134-135]

Such consideration of avoiding double recovery was also applied by the Court when the jury, during deliberations, sent a note to the Court reading as follows:

> "Your Honor, does the life expectancy come under the survival act or the wrongful death act?" [A. 137-138]

By agreement of counsel, the note was answered by the Court in the following language:

> "Court: All right, then in response to this, would this be agreeable then. In response to your inquiry the life expectancy applies only to the wrongful death action. Then have the marshal take that answer in without calling them back into the courtroom.
>
> "Mr. Horowitz: Yes.
>
> "Mr. Miller: Agreed.
>
> "Court: That is all, then." [A. 142]

The *Lazarus* case gives the jury discretion to award damages for permanent disabilities caused by negligence. The record shows that the factured hip and related injuries of the plaintiff's mother were permanent in nature [A. 81]. The plaintiff contends that under the authority of *Lazarus*, compensation could be made for permanent disability for the life expectancy of the decedent. Recovery for disability in that case was not limited to the period of time between injury and death. However, since the trial court here imposed

such limitations, argument of plaintiff's counsel to the jury was limited to the ten days the decedent languished following her fatal injury. Certainly, the jury was entitled to determine what amount should be awarded for complete disability of the decedent, lying flat on her back in a hospital bed deprived of the use of her whole body, during her last ten days on earth.

From all of the circumstances, the award of $3,994.15 therefor cannot be said to be so excessive as to shock the conscience. Clearly, it did not shock the conscience of the 12 jurors who heard all of the evidence, nor the able trial judge who likewise weighed the evidence and overruled the defendant's motions for judgment notwithstanding verdict or for a new trial.

III. The Trial Court Properly Took Judicial Notice of an Annuity or Present Worth Table Offered in Evidence by Plaintiff.

In order to assist the jury in determining the present worth of the pecuniary value of the life of the decedent, the plaintiff called as a witness an actuary who had not been listed in the Pretrial Order. The trial court sustained the objection of the defendant to the offered testimony which the offer of proof showed to be statistical and an explanation of the method of computing present worth [A. 87-89]. Plaintiff then immediately asked leave to introduce an appropriate annuity or present worth table (Exhibit 9) which the court took under advisement over-night, giving counsel for both sides an opportunity to present authorities in support of their respective positions [A. 93]. At a conference in chambers the following morning, the trial court admitted Exhibit 9 based on judicial notice [A. 84-93, 101]. In accepting the table, the court said that they are not binding on the jury but merely a tool that the jury may use with other evidence in the record [A. 97]. The trial court properly instructed the jury thereon [A. 129].

The court took judicial notice of a table showing the present worth at 3½% of an annuity for a term certain consisting of a range of years from one to thirty. This table came from Internal Revenue Bulletin, Cumulative Bulletin 58-2, issued by the Internal Revenue Service of the Treasury Department. Such table constitutes their standard annuity or present worth table and the figures are the same as those set forth in tables printed in Am.Jur.2d, Desk Book, p. 332, showing the present value of $1.00 per year payable at the end of each year for a specified number of years.

44 U.S. Code, § 307, provides in pertinent part as follows:

> "The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. *The contents of the Federal Register shall be judicially noticed, and without prejudice to any other mode of citation, may be cited by volume and page number.* (July 26, 1935, c. 417, § 417, § 7, 49 Stat. 502)." [Emphasis added]

The fact that the Internal Revenue Bulletin in question, including the estate tax regulations which contain Exhibit 9, was published in the Federal Register is shown by the following language from p. 433 of the Cumulative Bulletin 1958-2:

> "On October 16, 1956, notice of proposed rule-making regarding (1) the Estate Tax Regulations (26 CFR Part 20) under chapter 11 of subtitle B of the

> Internal Revenue Code of 1954 and under certain sections of subtitle F of the Internal Revenue Code of 1954, and (2) amendments to conform the Regulations on Procedure and Administration (26 CFR Part 301) to section 2 of the Act of August 6, 1956 (Public Law 1011, 84th Cong., 70 Stat. 1075) [C.B. 1956-2, 1206], was published in the Federal Register (21 F.R. 7850)."

In *Wei v. Robinson,* 246 F.2d 739 (C.A. 7, 1957), a question concerning applicable federal regulations was discussed by the court at p. 743 as follows:

> "Contents of the Federal Register and of the Code of Federal Regulations are prima facie evidence of the original text and are required to be judicially noticed. 49 Stat. 502, 50 Stat. 304, 44 U.S.C.A. §§ 307, 311."

It thus appears that the admissibility of the annuity table in question was proper based upon the court's power and duty to take judicial notice of such table, which is also reproduced in identical form as Document No. 137, Am. Jur. 2d, Desk Book, p. 339. The only requirement of the plaintiff in the way of foundation proof was to show that the table in question was a standard table used in determining the present worth of annuities, which was sufficiently satisfied by both the judicial notice statute as well as its publication in a standard legal publication such as the American Jurisprudence Desk Book. It should also be noted that trial counsel for the defendant, after lengthy colloquy with the court and opposing counsel, made an objection solely on the ground of relevancy when Exhibit 9 was offered in evidence in the presence of the jury. Defendant's counsel stated:

> [IN CHAMBERS] "The Court: You can do that in argument. Isn't that what you plan to do in argument?

"Mr. Horowitz: If I know how to work the tables.

"The Court: Isn't that simple. If your argument would be—First of all, she was going to die anyway.

"Mr. Horowitz: Right . . .

* * *

"Mr. Horowitz: When you put in this evidence are you going to put it in evidence and tell what your figure is?

"Mr. Miller: I plan to argue my figure.

"Mr. Horowitz: We can both use it . . .

* * *

[IN OPEN COURT] "Mr. Horowitz: I object to this due to the irrelevancy, as we contend this woman had no time to live.

"The Court: The Court will take judicial notice of the table offered and if you would prepare the copy, Mr. Miller, Mr. Clerk, what exhibit number would that be?

"The Clerk: Plaintiff's Exhibit No. 9." [A. 100, 101, 103]

The Court's power to admit evidence not specifically covered in the Pretrial Order is set forth in *The Washington Hospital Center v. Cheeks*, No. 21,364, ___ U.S. App.D.C.___ (1968).

Upon appeal, defendant contends that Exhibit 9 was not admissible without explanatory testimony by an actuary or expert witness. It is interesting to observe that the plaintiff attempted to have the method of computation of present worth explained to the jury by an actuary, which attempt was barred by the defendant's objection on the ground that the witness was not listed in the Pretrial Order. It would have been within the court's discretion to permit such testimony but the defendant surely should not be permitted to claim on appeal that it was entitled to benefit from the non-production

of a witness when its own objection prevented such testimony from being made to the jury.

In fact, there is a serious question whether evidence relating to the reduction to present worth of sums to be received over a period of years must be made by the defendant rather than the plaintiff. For example, in 16 Am.Jur., Proof of Facts, "Proof of Lost Earning Capacity", § 19, p. 718, the following statement appears:

> "Any judgment rendered to compensate for the destruction or impairment of earnings must be reduced to present worth or in other words to a sum that, when invested safely and prudently by a person untrained in financial matters at a conservative rate of interest, will produce the amount of income that the dead or injured person would have had during his life expectancy or work-life expectancy and that will have exhausted itself at the termination of such period.
>
> "This reduction in the amount of award is, of course, favorable to the defense, and for that reason there is a difference of opinion among plaintiff's counsel over whether this particular element in establishing the damages should be presented by the plaintiff or left to the defendant. In most cases it is probably better for the plaintiff to introduce this evidence on the principle of anticipation of unfavorable factors that are reasonably certain to be brought out by the defense."

In any event, annuity and mortality tables themselves are admissible in evidence and they do not require explanation by the testimony of an actuary or other expert. This principle was early laid down by the United States Supreme Court in *Vicksburg & M.R. Co. v. Putnam*, 118 U.S. 545, 7 S.Ct. 1 (1886). At p. 2, the Court stated:

> "In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including, not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. [Citing cases] In order to assist the jury in making such an estimate, standard life and annuity tables, showing, at any age, the probable duration of life, and the present value of a life annuity, are competent evidence."

There was no use of an actuary or other expert in the *Vicksburg* case with reference to the annuity tables in question, which were held to be admissible. The case was reversed because the court in its instructions went too far, in effect marking the annuity table opposite 49 years of age and then directing the jury to accept the tables as mathematical rules to be used by them in assessing damages instead of permitting the jury to estimate the loss of income according to their own judgment based upon all the other evidence in the case. In discussing the latter question, the Court said at p. 4:

> "Upon the evidence before them, it was a controverted question whether that injury would be temporary or permanent. The instruction excepted to, either taken by itself or in connection with the whole charge, tended to mislead the jury, by obliging them to ascertain the average injury to the plaintiff's capacity by the year, whether the extent of that injury would be constant or varying, and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimat-

> ing the probable duration of the plaintiff's life, and the extent of the injury which he had suffered."

The rule in the District of Columbia is set forth in *Philadelphia B & W R. Co. v. Tucker*, 35 U.S.App.D.C. 123 (1910), affirmed 220 U.S. 608, 31 S.Ct. 725. The principle is stated at p. 150 of the lower court's opinion as follows:

> "It is insisted that the assessment of damages was therefore mere guesswork. We do not think so. The jury was fully advised as to the decedent, who, when he was killed, was only twenty-four years of age. The jury saw the widow, and, as intelligent men, could judge as to her age and health. While annuity or life tables are admissible in evidence, they are not controlling. Vicksburg & M. R. Co. v. Putnam, 118 U.S. 545, 30 L.Ed. 257, 7 S.Ct. Rep. 1; Boswell v. Barnhart, 96 Ga. 521, 23 S.E. 414; Sutherland, Damages, § 1265."

The use of annuity or present worth tables alone, without the testimony of an actuary or other expert, was held proper in *Turrietta v. Wyche*, 54 N.Mex. 5, 212 P.2d 1041 (1949); *Matthews v. Nelson*, 57 N.J.Super. 515, 155 A.2d 111; *Coast S.S. Co. v. Brady*, 8 F.2d 16, 19 (C.A. 5, 1925); *Bruner v. McCarthy*, 105 Utah 399, 142 P.2d 649 (1943); *McNair v. Berger*, 92 Mont. 441, 15 P.2d 834, 838 (1932).

Finally, it should be noted that the trial counsel for both parties argued with reference to the table and Exhibit 9 and made whatever explanations were deemed desirable. Counsel for defendant urged that there was no life expectancy or that if there were, it was for a far shorter period than the average shown in the mortality tables. From this he concluded and argued that the annuity tables (Exhibit 9) showed very little if any pecuniary loss. The defendant could have offered any annuity or present worth tables it desired

and could have called expert witnesses if it desired to have expert testimony thereon. Having failed to do so and having had the full benefit of defendant's counsel arguing to the jury, it should not now be urged as reversible error.

IV. The Trial Court Correctly Instructed the Jury on the Question of Damages.

An examination of the entire charge to the jury shows that it correctly stated the rules of law applicable to the instant case. The instructions omitted nothing that ought to have been said and contained nothing that was not in harmony with established rules of evidence or that was not consistent with the principles announced by this court in its decisions under the Survival Act and the Wrongful Death Act. *District of Columbia v. Woodbury*, 136 U.S. 450, 10 S.Ct. 990, 994 (1890).

The court correctly instructed the jury with regard to the elements of damages under both statutes [A. 127-129]. The use of mortality tables was described and properly limited. The jury was explicitly informed that there could be no double recovery for medical and hospital bills [A. 134-135]. The jury was also informed that the life expectancy of the decedent applied only to the action under the Wrongful Death Act [A. 137-138, 142].

Defendant in its brief on appeal contends that reduction to present worth is not spelled out as such in the Wrongful Death Instruction. Such principle was clearly enunciated in the Survival Act Instruction and the instructions are to be read as an entire series. In any event, it has been held that a defendant's failure to request an instruction on the present worth or value of future losses bars the consideration of such question on appeal. *Chicago & N.Y. R. Co. v. Candler*, 283 Fed. 881 at 883 (C.A. 8, 1922); *Louisville & Nashville R. Co. v. Holloway*, 246 U.S. 525, 38 S.Ct. 379 at 381 (1918). See also *United States Electric Lighting Co. v. Sullivan*,

22 App. D.C. 115 (1903); *Baltimore & P.R. Co. v. Mackey*, 157 U.S. 72, 39 L.Ed. 624, 15 S.Ct. 491.

The applicability of Rule 51 of the Federal Rules of Civil Procedure to a failure to request instructions on present worth was discussed by the court in *McNamara v. Dionne*, 298 F.2d 352 at 355-356 (C.A. 2, 1962). See also, *Rodgers v. Bryan*, 82 Ariz. 143, 309 P.2d 773 (1957).

In this regard, defendant also contends that there could be no future allowance because the mother each month spent the entire amount of her annuity. In fact, the evidence shows that almost half of her annuity was spent to amortize the mortgage on the home she owned and that therefore with each payment her net equity was increased. It was also a question for the jury whether in the future the mother would have continued to spend the entire amount of her annuity or might have realized savings therefrom.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgments below under both the Wrongful Death Act and the Survival Act should be affirmed.

Respectfully submitted,

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